Prêmio Mundo Cão de Literatura
Criminológica Brasileira

FUNDAMENTAL RIGHTS TO LIFE AND TO ABORTION

a constitutional, gender and criminological perspective

MÔNICA DE MELO

EDITORA Blimunda

CRIMLAB

Translation by
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Established in 2016 by Leandro Ayres França, **CRIMLAB** began as a collaborative study group bringing together researchers, academics and those interested in reading and discussing criminological publications. Its main mission has been to promote criminological knowledge and make it accessible to society. The group has evolved through different formats, welcomed different generations of participants and developed numerous projects.

The **Prêmio Mundo Cão** de Literatura Criminológica Brasileira was launched in 2023 to promote criminological literature published in Brazil. The name of the prize honours the space where the study group held its first meetings and events, in Porto Alegre (Brazil).

The first edition of the prize involved an evaluation process by CRIMLAB participants, with decisions made after extensive meetings and debates. The inaugural winner was **Mônica de Melo**'s book on abortion (Appris, 2023), based on her Ph.D. thesis.

The present English translation and open access publication of Melo's work was supported by the Research England International Science Partnerships Fund (ISPF) Institutional Support Grant (ODA) for 2024-25, with the collaboration of the University of Reading. Published by **Blimunda**, this is the first volume of a collection that aims to internationalise award-winning Brazilian criminological works. With this, it seeks to inspire Brazilian researchers and publishers, while improving global access to academic contributions from the Global South.

Leandro Ayres França
Eduarda Rodrigues Ribas
Khalil Pacheco Ali Hachem
Mateus Augusto Silveira Ribeiro
www.crimlab.com

To Antonio, Caio and Francisco.
With them I can experience
the deep meanings of desired
motherhood and the importance of
respecting women's right to decide.

PREFACE TO THE BRAZILIAN EDITION

It is an honor and a joy to start this book by congratulating the author and PUC-SP, the university where she defended her thesis on the fundamental right to life and abortion from the constitutional, gender and criminology perspective.

To the author, feminist, Public Defender and Professor of Constitutional Law, for electing for her doctoral dissertation a crucial theme to the fundamental rights and freedoms of women, but still difficult and controversial in our country.

To PUC-SP, a cornerstone of democracy and human rights in our country, which is aware that the construction of knowledge and the ethical formation of each student require dialogue of ideas and critical debates; it is consistent in not inhibiting, nor violating free thinking and the free search for paths and solutions to achieve effective social justice.

Monica, in her acknowledgements, expresses the deep meaning she personally experiences about the desired motherhood and, at the same time, about the importance of respecting the right of women to decide whether or not to be mothers.

And this acknowledgement, in turn, expresses very beautifully the reasons that underlie not only the choice of its subject of study but also its professional and activist action for the end of discrimination and violence against women, as well as for the implementation of the basic constitutional principles of equality, citizenship and dignity of the human person of men and women.

The study was structured brilliantly and strategically.

It took care, in the first place, of patriarchal misogyny, which has historically reserved subordinate social roles for women, using the concept of gender, which since the mid-twentieth century has been a powerful instrument to unveil the intricate tricks of patriarchy in maintaining male power.

Simone de Beauvoir, in her study of the social condition of women, powerfully revealed that women's inferiority is not inherent but rather politically and culturally constructed. Her statement, *One is not born, but rather becomes, a woman,* serves as a foundational milestone for women's emancipation and gender theories, as it deconstructs nature and biology as determinants of "being a woman". Interestingly, she did so without explicitly mentioning the concept of "gender".

Mônica presents us with the "gender ideology", strongly influenced by religious fundamentalisms, as an essential component of the criminalization of abortion. She states that the authors who created this expression not only reject the concept of gender as a valuable analytical instrument of the relations between men and women, but, in bad faith, seek to disqualify this concept, boasting that international foundations, left-wing parties and feminist non-governmental organizations in our country intend to abolish the family as a social institution, in total violation of the Federal Constitution of 1988.

It is regrettable how patriarchal and sexist ideology persists alongside the evolving social dynamics of new forms of work and production, including modern family structures, where women are often the primary providers.

She points out that Alda Facio and Lorena Fries enlighten our perception of law, when they affirm that there is no neutrality in it, as it is conditioned by the cultural standards and ideologies of the societies in which it is built and that, therefore, the construction of a critical feminist theory of law is important.

The author presents feminism as a social, political, and theoretical movement arising from women's awareness of their position as a subordinated, discriminated, and oppressed collective under patriarchy.

It is the feminist theory of law that allows the understanding of sexism in law, present in statutes, judicial decisions and legal theory. It allows the understanding of the criminalization of abortion in its relationship with the male patriarchal control of women's sexuality and reproduction.

The author studies the issue of abortion from a constitutional perspective and, in doing so, she initially approaches the issue of secularity and its relationship with the democratic rule of law, which implies the recognition of the plurality and diversity existing in our country.

Her thesis argues that in the correlation between the fundamental right to life and abortion there is a duty to decriminalize abortion in Brazil and presents four hypotheses: the right to life is not absolute and must be re-signified in the light of the right to life of women; the right to life must be understood in the light of constitutional rights, such as freedom, privacy, autonomy, health and dignity of the human person; the criminalization of abortion is a manifestation of a patriarchal and sexist legal system that aims to control women's

sexuality and bodies; there is a primary criminalization of abortion by the 1940 Penal Code, however, since secondary criminalization is weak, there is no effective protection of the unborn life.

The contribution of this book to Brazilian critical legal thought is notable, presenting ideas from great jurists such as Dworkin and Ferrajoli; presenting ideas from anthropology, psychology, psychoanalysis, philosophy, law, morality and ethics in an interdisciplinary way.

It is worth mentioning the perspective of Luigi Ferrajoli (2003, p. 10, emphasis added) – an Italian jurist who plays a significant role in academic legal debates in our country – on the crucial point of discussion regarding a woman's autonomy in deciding on the termination of an unwanted pregnancy, a principle he explicitly invokes. The jurist states:

> [...] reside na tese moral de que a decisão sobre a natureza de "pessoa" do embrião deve ser remetida para a autonomia moral da mulher, em virtude da natureza justamente *moral* e não simplesmente biológica das condições em presença das quais ele é "pessoa".

> [...] it lies in the moral thesis that the decision about the embryo's status as a "person" should be left to the woman's moral autonomy, due to the inherently moral, rather than simply biological, nature of the conditions under which it is considered a "person".

I will not delve into the contributions of international and Inter-American law to the debate on the still-controversial issue of abortion. I simply wish readers a fruitful reading experience.

I conclude by expressing my sadness at how, despite our geographic proximity, we remain so far from the progress made by Argentine, Uruguayan, and Chilean women on this issue. In Brazil, by contrast, we are confronted with alarming bills in the National Congress and even proposals for constitutional amendments aiming to safeguard the rights of the unborn from conception.

Despite the obscurantist obstacles of the current Brazilian political moment, we, feminist women, continue to resist, persist, and fight to move forward!

Silvia Pimentel

PhD professor at the Faculty of Law of the Pontifical Catholic University of São Paulo (PUC/SP); Leader of the research group "Law, Gender Discrimination and Equality" at PUC/SP; Member of the Monitoring Committee of the Convention on the Elimination of All Forms of Discrimination against Women of the United Nations (CEDAW/UN Committee), from 2005 to 2016, having been its president in 2011 and 2012; Co-founder of the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM); author of several books and articles on women's human rights.

SUMMARY

PART 3

INTRODUCTION

Janaína is illiterate. She was enrolled in school at age 7, but the teacher said she was "mentally retarded". From then on, she never went to school again. She lives with her dad and never worked. Also, her mental health was never treated until after her last abortion, in 2002. Her sister said this one was spontaneous as Janaina had uterine fibroids. She did could not talk during the interrogation and was interpreted by her sister, she only responded by gestures, yes or no. She could not tell who she had had sex with or where. She went to the healthcare center with the fetus (about 5 months old) in a grocery bag. The healthcare center contacted Military Police Operations Center (COPOM), who took Janaina to a Hospital where she underwent curettage. She is mentally disabled, vanishes from her house, has had 5 or 7 abortions. It seems 4 of them spontaneously and the others with tea intake. She had a son who was also born mentally disabled (Down Syndrome) and died at the age of 11. This child would be from a brother-in-law with whom she has supposedly had her first sexual intercourse. It is believed to have been a rape when she was about 22 years old. After that, she began spending a lot of time on the streets and engaging in indiscriminate sexual relations with several men. Forensic report: moderate intellectual disability.[1]

The criminalization of abortion[2] has become a serious public health problem in Brazil. A technical note presented by the Ministry of Health on August 3, 2018, at the public hearing regarding the Claim of noncompliance with a fundamental precept (ADPF) 442, in which the unconstitutionality of the criminalization of abortion is discussed, emphasized that maternal mortality is one of the most sensitive indicators to assess the quality of life and access to quality health by women in a given territory and in a given period of time:

> Em 2000 o Brasil assumiu compromisso internacional com os Objetivos de Desenvolvimento do Milênio (ODM), o que implicaria reduzir a morte materna em 75% até 2015, tendo por base os dados de 1990. Isso permitiria que o país chegasse a uma Razão de Mortalidade Materna (RMM) de 35 óbitos/100.000 nascidos vivos em 2015. Embora o número de mortes maternas no Brasil tenha apresentado uma redução de 57%, entre 1990 e 2015, esta foi menor que a prevista nos ODM, e o Brasil chegou ao final de 2015 com uma RMM de 62,0 óbitos/100.000 nascidos vivos.
>
> O aborto é a 4ª causa de morte materna por causas obstétricas diretas no país. Vale destacar o grande desafio que é reduzir a mortalidade materna por abortamento em países onde o aborto se realiza na clandestinidade e ilegalidade. A ilegalidade aumenta a chance de complicação, pois leva às mulheres a não declarem ter interrompido a gestação quando são atendidas na emergência dos hospitais, dificultando o diagnóstico e intervenção médica oportuna, agravando o risco de morte. (Brazil, Ministério da Saúde, 2018, p. 5-7)

In 2000, Brazil made an international commitment to the Millennium Development Goals (MDGs), which

> consisted in reducing maternal death by 75% by 2015, based on 1990 data. This would allow the country to reach a Maternal Mortality Ratio (MMR) of 35 deaths/100,000 live births in 2015. Although the number of maternal deaths in Brazil decreased by 57% between 1990 and 2015, this was lower than predicted in the MDGs, and Brazil reached the end of 2015 with a MMR of 62.0 deaths/100,000 live births.
>
> Abortion is the 4th leading cause of maternal death from direct obstetric causes in the country. It is worth emphasizing that reducing maternal mortality from abortion is particularly challenging in countries where the procedure is carried out clandestinely and illegally. Such illegality increases the chance of complications, as it discourages women from declaring that they have interrupted their pregnancy when seeking emergency hospital care, making diagnosis and timely medical intervention more difficult and aggravating the risk of death.

Criminalizing abortion has also proven ineffective in preventing its occurrence. Many women resort to clandestine abortions performed under unsafe conditions, without medical or hospital supervision. When they do seek medical care, they are sometimes reported and even arrested. Data on the magnitude of abortion, the profiles of women who undergo abortions, the methods they use, and the conditions under which these abortions occur are scarce. This lack of information is partly due to the challenges of researching a topic associated with penal repression — not only through formal social control but also informal social control.

It seems that no one is immune to the topic; everyone has something to say about it. Women who become pregnant and do not wish to continue the pregnancy face intense social scrutiny — for their sexuality, for their decision not to embrace motherhood, for prioritizing other life projects at that moment, for social or economic reasons, for being satisfied with the number of children they already have, for the absence of a father, or due to the lack of public and social support for those with children, among countless other possible reasons.

Abortion is a highly controversial topic in society, sparking passions, hatred, and polarization across all domains: religious, moral, social, philosophical, legal, and medical.[3]

Marcia Tiburi (2014, p. 163) describes abortion as the perfect metaphor for moralism — an "evil" metaphor constructed through a disrespectful view of women —, which underpins the patriarchal discourse. According to her, abortion discussion in Brazil is merely a spectral manifestation of the masculinist ideology against women. Beneath the veil of moralism, abortion continues to occur daily.

In a scenario lacking reliable data, the National Abortion Survey, by Débora Diniz and Marcelo Medeiros (2010, p. 959) stands out. This survey used random household sampling, covering women aged between 18 and 39 years old, throughout urban areas in Brazil, and combined two survey techniques: the self-administered questionnaire and face-to-face interviews conducted by female interviewers[4]. The first one, also known as the ballot box technique, consists of a confidential questionnaire, filled out by the interviewees and deposited in a ballot box, and is one of the best approaches for this type for estimating abortion rates.

This was the first study in Brazil to use this technique. Even so, it did not cover adolescent abortions, illiterate women, or the ones living in rural areas, suggesting that the actual number of abortions

in Brazil is higher than the survey reported. Also, the study focused on women who had abortions, not to the number of abortions, since one woman could have had multiple procedures.

The results indicate that by the end of their reproductive years, more than one in five women will have had an abortion. These typically occur during the prime reproductive years, between the ages of 18 and 29. No significant differences in abortion rates were found based on religious beliefs, although abortion was more prevalent among women with lower levels of education. Medications were used to induce the most recent abortion in about half of the cases, and post-abortion hospitalization was reported in approximately half of them. The majority of women who had abortions identified as Catholic, followed by Protestants and Evangelicals.

The researchers emphasize that the main studies on the magnitude of abortion in Brazil employ three methodological approaches: hospital admission records for medical procedures related to abortion, such as curettage, with the most recent calculations based on records from the Unified Health System (SUS), to which correction factors are applied to estimate the national number of abortions. The second approach consists of bedside surveys with women hospitalized for abortion-related complications, where their abortion stories are retrieved by healthcare professionals responsible for their medical care. The third approach involves data collection techniques conducted outside the hospital setting.[5]

The Ministry of Health's publication, *20 Anos de Pesquisa sobre Aborto no Brasil* [20 Years of Research on Abortion in Brazil] provides an important overview of the subject of abortion:

> Quem são elas
> *Predominantemente, mulheres entre 20 e 29 anos, em união estável, com até oito anos de estudo, trabalhadoras, católicas,*

com pelo menos um filho e usuárias de métodos contraceptivos, as quais abortam com misoprostol.

Magnitude

Um estudo recente sobre a magnitude do aborto no Brasil estimou que 1.054.242 abortos foram induzidos em 2005. A fonte de dados para esse cálculo foram as internações por abortamento registradas no Serviço de Informações Hospitalares do Sistema Único de Saúde. Ao número total de internações foi aplicado um multiplicador baseado na hipótese de que 20% das mulheres que induzem aborto foram hospitalizadas. (Brazil, 2009, p. 26, *emphasis added*).

Who are they? *Predominantly, the profile includes women aged 20 to 29, in stable unions, with up to eight years of schooling, employed, Catholic, with at least one child, and users of contraceptive methods, who undergo abortions using misoprostol.* Magnitude - A recent study on the magnitude of abortion in Brazil estimated that 1,054,242 induced abortions occurred in 2005. The data source for this calculation was hospitalizations due to abortion recorded in the Hospital Information System of the Unified Health System. A multiplier was applied to the total number of hospitalizations, based on the assumption that 20% of women who induce abortion are hospitalized (Brazil, 2009, p. 26, emphasis added).

The systematization of data by the Ministry of Health reveals a significant number of women hospitalized due to complications arising from induced abortion. This underscores the fundamental importance of safeguarding medical confidentiality in such cases.

Several constitutional rights are involved in this issue, starting with respect for the secular nature of the State, as well as the rights to life,

privacy, liberty, autonomy, health, and reproductive health. Often, the protection of the right to fetal life[6] placed in opposition to other rights attributed to women. On the other hand, to address the issue in depth, it is necessary to examine sexism in the legal system itself, as well as gender stereotypes produced and reproduced by those who operate it and generate unjustified gender discrimination. It is also important to investigate whether criminal law is effective in protecting unborn life.

This work argues that, in the correlation between the fundamental right to life and abortion, there is an obligation to decriminalize abortion in Brazil, based on constitutional, gender, and criminological perspectives. The working hypotheses raised were:

a. The right to life of the fetus is not absolute and must be (re) interpreted in light of women's right to life;
b. The right to life must be understood in conjunction with other constitutional rights of women, such as liberty, privacy, autonomy, health, human dignity, and the principle of a secular state;
c. The criminalization of abortion is due to a legal system that remains sexist and patriarchal, using the crime of abortion as a means to control women's sexuality and bodies;
d. Although abortion is considered a crime under the Penal Code (primary criminalization), secondary criminalization is weak and ineffective within the Legal System, meaning that criminalizing abortion fails to effectively protect unborn life.

In order to investigate the hypotheses raised, the following questions guided the development of this book.

- **Constitutional:** Does the protection of the constitutional right to life prevent the decriminalization of abortion in Brazil?
- **Gender:** Is the criminalization of abortion in Brazil a way of controlling women's bodies and sexuality?
- **Criminology:** Is secondary criminalization, carried out by the agents responsible for enforcing the law, effective in the case of abortion? Moreover, is criminal law effective in preventing abortions and protecting unborn life?

For the completion of this work, a literature review on the topic was conducted, as well as an analysis of court decisions and empirical research carried out at the First Jury Court of São Paulo, examining cases of abortion performed by the pregnant woman from 1990 to 2012.

In order to answer the questions raised and verify the working hypotheses, the book is divided into three parts. "Part 1" addresses gender relations and Law; "Part 2" focuses on abortion and the Federal Constitution of 1988; and "Part 3" examines the unconstitutionality of abortion in Brazil.

The aim is to demonstrate that there is an obligation to decriminalize abortion in Brazil, based on an analysis of the fundamental constitutional rights of women, in balance with the right to life, international human rights standards, as well as gender and criminological perspectives, all of which weaken the argument for the necessity of criminalizing abortion to protect unborn life.

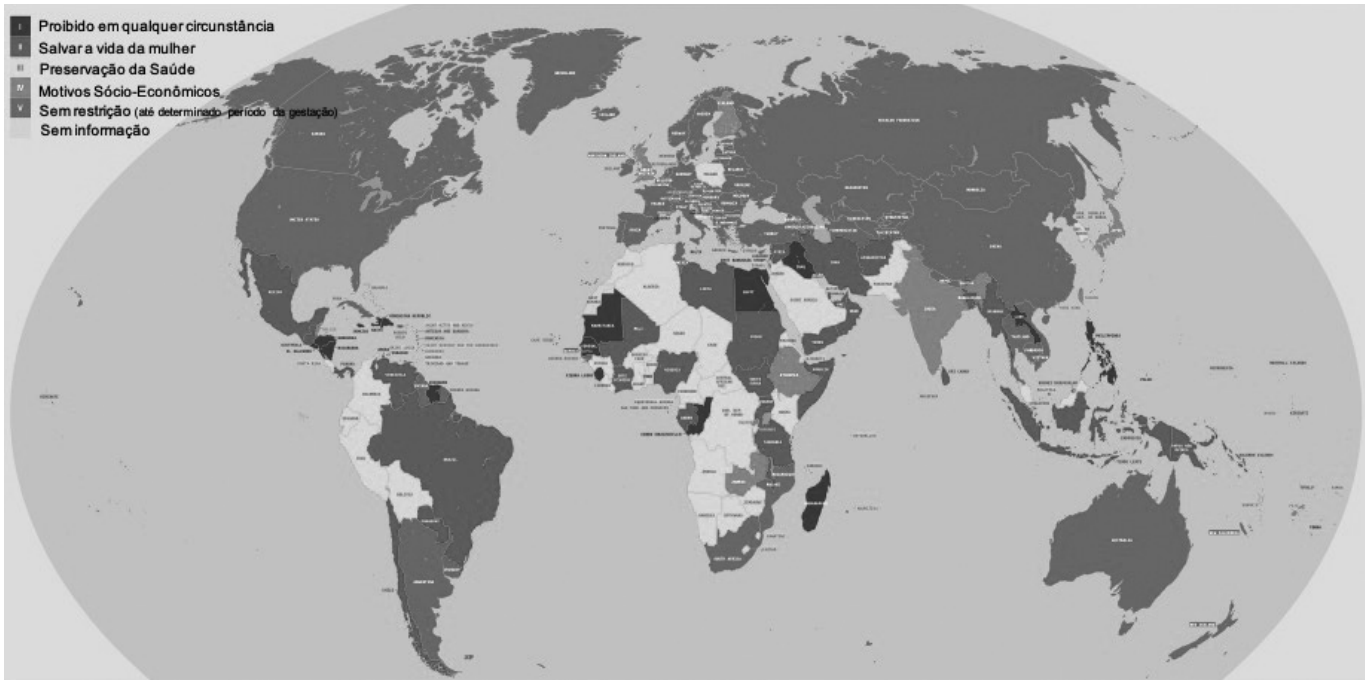
Criminalization, in addition to failing to prevent abortions — which continue to occur, often in the most dangerous forms — leads women to death or permanent sequelae due to unsafe abortion practices[7]. This situation is particularly severe in countries with stricter legislation. It is observed that, in most cases, the strictest laws are found in poorer countries, the so-called peripheral nations

located in the "Global South," where sexual education, contraception, and family planning policies are often precarious.

Since 1998, the American organization Center for Reproductive Rights has produced a world map of abortion laws to compare the legal status of induced abortion across different countries and advocate for expanded access to safe and legal abortion for all women. The organization argues that the legalization of abortion is a significant indicator of women's ability to exercise their reproductive rights. The map on the next page clearly demonstrates that, generally, countries in the Global North have more liberal abortion laws. In contrast, countries in the Global South tend to adopt stricter legislation.

Brazil, therefore, aligns with this unfortunate reality. The analysis presented here seeks to provoke reflections on the urgent need to revise the current criminalization of abortion. Such revision should aim to uphold a constitutional interpretation that respects women's human rights while ensuring protection for intrauterine life.

MAP 1 – The world's abortion laws 2021



Source: Center for Reproductive Rights (2021)

Point to the following QR Code and you will access the “Interactive Map of Abortion Laws in the World,” produced by the Center for Reproductive Rights, New York, USA.

1

GENDERED SOCIAL RELATIONS AND LAW

1.1 GENDERED SOCIAL RELATIONS AND THE CRIMINALIZATION OF ABORTION

1.1.1 From the oppression of women to gender oppression

Juliana was taken to the hospital with abdominal pain after having expelled the fetus, which she had left in a bag near the door of her house. The doctor observed a piece of umbilical cord and requested the fetus be retrieved. Her sister and brother-in-law took care of it. The fetus was in the yard, where it had been left, and the police were called. There had been suspicions about her pregnancy, but Juliana consistently denied it, even at the hospital. She often complained of stomach pain, so she consulted a doctor, and followed a prescribed medication, which her mother bought. The identity of the father was unknown. In her statement, Juliana explained that she had become pregnant by someone who, upon learning of the pregnancy, abandoned her, leaving her with four children to care for. Desperate, she rejected the pregnancy and began taking several medications, which ultimately led to a premature birth at home without assistance.

The hospital refused to provide her medical records due to patient confidentiality. In response, the chief of police issued an official letter, warning that withholding the records constituted contempt of court. The chief of police argued that the case allowed breach of confidentiality because it involved a matter of urgent public interest — the protection of human life, the most valuable thing there is — and it was imperative to address crimes against it.

A writ of mandamus was filed into the by Santa Casa de Praia Grande hospital, challenging a court order that compelled them to release patient data or records to the court.

The demand for equality between women and men dates back centuries, long before the emergence of the term "gender equality" and "feminism" as a social emancipatory movement, both of which originated in the 20th century. Oppression against women was experienced, recognized and fueled certain struggles as far back as the 17th century.

Clarke (2013, p. XIII) compiled and translated three texts from 17th-century authors—Marie le Jars de Gournay (1622), Anna Maria van Schurman (1641), and François Poulain de la Barre (1673)—that advocated for the equality of women and men, as well as women's right to equal access to educational opportunities. The editor of the collection labeled the works as "feminist" in the title and explained that the translated texts are considered feminist because they rejected the misogynistic traditions that devalued women compared to men. Furthermore, the authors provided arguments to challenge the inferior status of women that prevailed in both civil and ecclesiastical societies of the 17th century.

In a word, these authors were feminists because they rejected what is now called "gender" as a valid criterion for discrimination among human beings. Marie de Gournay was the first of them to argue for the equality of men and women, in 1622. in *The Equality of Men and Women* (Clarke, 2013, p. 13). Anna Schurman explicitly associated her work with Gournay's (Clarke, 2013, p. 23). Both accepted the authority of the Bible but rejected interpretations of its texts that discriminated against women. Poulain de la Barre, on the other hand, completely dismissed the scriptures as relevant for deciding whether men and women were equal.

According to Clarke (2013, p. 52), one of the greatest achievements of the 17th-century feminists was adding "sexual identity" to the list of irrelevant criteria for justifying unequal treatment of classes of people. They challenged those who defended unequal treatment of women. Gournay and Poulain recognized that there was no reason to exclude women from education except to preserve men's privileges and powers.

Clearly, such thoughts could not be plausible or acceptable to women, much like the financial gains of slave owners could not persuade enslaved people to willingly accept their condition. Since such reasons could not be articulated without provoking refutation, proponents of inequality often appealed to customs or traditional interpretations of the Bible. This arbitrary arrangement, however, was justified by invoking God's supposed unquestionable decision.

In other words, the oppression women face for being women is noted by diverse authors across various fields of knowledge.

In the 18th century, notable contributions include Mary Wollstonecraft's *A Vindication of the Rights of Woman,* in 1792, and *The Declaration of the Rights of Woman and the Female Citizen* by Olympe de Gouges in 1791, created as a counterpoint to the French Revolution's *Declaration of the Rights of Man and of the Citizen* from 1789. These English and French authors challenged the dominant narrative of their times. Olympe was imprisoned and guillotined for advocating for women's equality.

Maria Lygia Quartim de Moraes (2016) notes that Wollstonecraft's *A Vindication of the Rights of Woman,* with its vehement defense of gender equality, can be considered the founding document of feminism. This work is believed to have been published in response to the French Constitution of 1791, which excluded women from the category of citizens. According to the preface writer:

> O livro denuncia os prejuízos trazidos pelo enclausuramento feminino na exclusiva vida doméstica e pela proibição do acesso das mulheres a direitos básicos, em especial à educação formal, situação que fazia delas seres humanos dependentes dos homens, submetidas a pais, maridos ou irmãos. (Moraes, 2016, p. 7).

> The book denounces the harm caused by the confinement of women to an exclusively domestic life and the prohibition of their access to basic rights, particularly formal education. This situation rendered women dependent on men, they were subjected to fathers, husbands, or brothers.

Around 150 years later, in 1949, Simone de Beauvoir published *The Second Sex*, a book that influenced feminists worldwide and became a symbol of women's struggle for emancipation, self-determination, and freedom. The second volume (*Lived Experience*) begins with the excerpt below, which has become an emblematic synthesis of the author's ideas presented therein:

> Ninguém nasce mulher; torna-se mulher. Nenhum destino biológico, psíquico, econômico define a forma que a fêmea humana assume no seio da sociedade; é o conjunto da civilização que elabora esse produto intermediário entre o macho e o castrado, que qualificam de feminino. Somente a mediação de outrem pode constituir um indivíduo como um Outro. (Beauvoir, 2016, p. 11).

> One is not born, but rather becomes a woman. No biological, psychological, or economic fate determines the shape that the human female takes within society; it

> IS CIVILIZATION AS A WHOLE THAT PRODUCES THIS INTERMEDIARY PRODUCT BETWEEN THE MALE AND THE CASTRATED, WHICH THEY CALL FEMININE. IT IS ONLY THROUGH THE MEDIATION OF OTHERS THAT AN INDIVIDUAL CAN BE CONSTITUTED AS AN OTHER.

This becoming a woman as a product of culture precedes all gender studies[8] that would emerge starting in the 1970s, whether in medicine or in the social sciences. Beauvoir takes a strong stand against biologizing theories:

> Penso que a mulher liberada seria tão criadora quanto o homem. Mas que não trará valores novos. Acreditar o contrário é crer que existe uma natureza feminina, coisa que sempre neguei. É preciso varrer todos esses conceitos completamente. Que a libertação da mulher traz novos tipos de relações entre os seres, que os homens, como as mulheres, tenham mudado, não há dúvida. É preciso que as mulheres sejam exatamente como os homens, seres humanos integrais. As diferenças que existem entre eles não são mais importantes que as diferenças individuais que possam existir entre as mulheres ou entre os homens. (Schwarzer, 1986, p. 44).

> I BELIEVE THAT A LIBERATED WOMAN WOULD BE AS CREATIVE AS A MAN. BUT SHE WILL NOT BRING NEW VALUES. TO BELIEVE OTHERWISE IS TO ASSUME THE EXISTENCE OF A FEMININE NATURE, WHICH I HAVE ALWAYS DENIED. IT IS NECESSARY TO COMPLETELY SWEEP AWAY ALL THESE CONCEPTS. THAT THE LIBERATION OF WOMEN BRINGS NEW TYPES OF RELATIONSHIPS BETWEEN BEINGS, THAT MEN, LIKE WOMEN, HAVE CHANGED, THERE IS NO DOUBT. WOMEN MUST BE EXACTLY LIKE MEN, WHOLE HUMAN BEINGS. THE DIFFERENCES BETWEEN THEM ARE NO MORE SIGNIFICANT THAN THE INDIVIDUAL DIFFERENCES THAT MAY EXIST AMONG WOMEN OR AMONG MEN.

Beauvoir challenges, within the feminist movement, assumptions that value a supposedly superior feminine nature, which she regards as a mystification of femininity:

> Dizer que a mulher tem ligações especiais com a terra, com o ritmo lunar, com as marés, etc. Que tem mais alma, que é naturalmente menos destruidora, etc. Não, se houver alguma verdade nisso tudo, não é em função de nossa natureza e sim de nossas condições de vida.
> As garotinhas "tão femininas" são fabricadas assim e não nascidas assim. Numerosos estudos o provam. *A priori,* uma mulher não tem valor especial porque é mulher. Seria o biologismo mais retrógado, em contradição com tudo o que penso.
> [...]
> Mas não é preciso fazer disso um valor e acreditar que o corpo feminino dá uma nova visão de mundo. Seria ridículo e absurdo, seria como fazer um contrapênis. Mas mulheres que partilham dessa crença recaem no irracional, no misticismo, no cósmico. Fazem o jogo dos homens que, assim, poderão oprimi-las melhor, afastando-as melhor do saber e do poder. (Schwarzer, 1986, p. 77)

> Saying that women have special connections with the earth, the lunar rhythm, or the tides; that they possess more soul or are naturally less destructive—these notions, even if containing some kernel of truth, arise not from our nature but from the conditions of our lives. Little girls are made 'so feminine,' not born that way, as numerous studies demonstrate.
> A woman does not hold any special value simply because she is a woman. To believe otherwise is the most retrograde biologism, contradicting everything I stand for.
> [...]

> It is unnecessary to elevate this into a value or to think the female body offers a new vision of the world. That would be ridiculous and absurd, akin to creating a counter-phallus. Women who share such beliefs fall into irrationality, mysticism, and cosmic thinking, which only serves the interests of men, allowing them to oppress women more effectively by distancing them from knowledge and power.

The concept of gender, and of gender relations, is much more recent, dating back to the mid-20th century. It emerged as an analytical category that enabled the rejection of the paradigm of biological determinism—that is, the idea that biology is the determinant for the construction of categories of people defined by their biological sex as women or men. Silvia Pimentel (2017), when addressing the topic of gender and Law, connected the concept of sex and gender to what she referred to as the three waves of feminism. Regarding the first period, in which these concepts were identified as one and the same, she highlights that:

> Trata-se de abordagem essencialista do masculino e do feminino, em que seus pressupostos sustentam as abordagens mais tradicionais e conservadoras da sexologia, da genética, da biologia, da medicina psiquiátrica, da psicologia clínica e da educação e, inclusive, do direito.
> [...]
> A teoria essencialista sobre gênero – e respectivo determinismo biológico – é criticada pelos construcionistas sociais, que ressaltam os aspectos relacionais como dimensão fulcral de gênero. (Pimentel, 2017, p. 5-7)

> It is an essentialist approach to the masculine and the feminine, whose assumptions support the more traditional and conservative perspectives of sexology, genetics, biology, psychiatric medicine, clinical psychology, education, and even law.
>
> [...]
>
> The essentialist theory of gender — and its corresponding biological determinism — is criticized by social constructionists, who emphasize relational aspects as the central dimension of gender.

Thus, as Citeli (2001, p. 132) points out, it is important to denaturalize power hierarchies based on sex differences. This has been one of the central axes of gender studies. Establishing the distinction between components — natural/biological, in relation to sex, and social/cultural, in relation to gender — has been and remains a strategy employed by gender studies to highlight and challenge essentialisms of all kinds, which for centuries have supported biologizing arguments used to disqualify women physically, intellectually, and morally.

The emergence of the category "gender" was, and continues to be, fundamental in questioning the potentialities of the body when biological determinism and an absolute respect for nature enforced mandatory motherhood on all women.

It is important to address the issue of abortion from the perspective of discrimination in social gender relations—gender discrimination rather than sex discrimination—because the identity of "woman" extends far beyond the possession of female genitalia and reproductive organs. It is not enough to have biologically female genitalia to be considered a "woman" from a social and political standpoint; it also

requires the adoption of certain behaviors, ways of speaking, dressing, expressing or withholding emotions, laughing, and choosing life projects typically associated with "being a woman."

An individual who seeks to be socially recognized as a woman is also required to exhibit "social genitals" of a woman. Otherwise, they are perceived as something else — a being in the making, an "abnormal," a "deviant," someone unacknowledged within a binary and heteronormative system. In this context, the so-called "sex discrimination" is reductive, simplistic, and inadequate in explaining a far more complex reality — one that is constructed and continuously reshaped through and within social relations between biological sexes.

Therefore, it must be understood that the distinction between sex and gender is an important initial step, both theoretically and politically, in challenging socially constructed identities and the prevailing naturalization of certain constructs of "being a woman," rooted in the obligation of reproduction and the control of sexuality.

The distinction between sex and gender emerged in the mid-20th century within medicine and the social sciences. Robert Stoller (1968, p. 9), a psychiatrist and psychoanalyst, was one of the pioneers in medical literature to establish this differentiation in *Sex and Gender*. He stated that he preferred to restrict the term "sex" to a biological connotation, asserting that, with few exceptions, there are two sexes: male and female. To determine sex, physical conditions such as chromosomes, external and internal genitalia, gonads, hormones, and secondary sexual characteristics should be examined. The biological sexual division determines who is a man and who is a woman. Gender, on the other hand, would be a term with psychological or cultural connotations. While the terms used to designate sex are *man* or *woman*, those used to designate gender are *masculine* and *feminine*, which are independent of biological sex.

There are certain authors in the social sciences who are essential to understand this distinction and who pioneered what are now called "gender studies" or "studies from a gender perspective." Among them are Gayle Rubin and Joan Scott.

Rubin (1993), in her text *O tráfico de mulheres: notas sobre a economia política do sexo*[9], which has become a cornerstone in the study of gender relations, seeks to explain the oppression of women through the theories of Lévi-Strauss, Sigmund Freud, and Marx. This dimension of social life, in which women's oppression takes place, is defined by the author as the sex/gender system:

> Adoto como definição preliminar de um "sistema sexo/gênero: um conjunto de arranjos através dos quais uma sociedade transforma a sexualidade biológica em produtos da atividade humana, e na qual estas necessidades sexuais transformadas são satisfeitas.
>
> Toda sociedade conta ainda com um sistema de sexo/gênero: um conjunto de arranjos através dos quais a matéria-prima biológica do sexo e da procriação humanas é moldada pela intervenção humana e social e satisfeita de forma convencional, pouco importando o quanto bizarras algumas dessas convenções podem parecer.
>
> No nível mais geral, a organização social do sexo repousa sobre o gênero, a heterossexualidade obrigatória e a coerção da sexualidade feminina. Gênero é uma divisão dos sexos socialmente imposta. É um produto das relações sociais da sexualidade. (Rubin, 1993, p. 2-10)

I adopt as a preliminary definition of a "sex/gender system": a set of arrangements through which a society transforms biological sexuality into products of

> HUMAN ACTIVITY, AND IN WHICH THESE TRANSFORMED SEXUAL NEEDS ARE SATISFIED.
>
> EVERY SOCIETY ALSO HAS A SEX/GENDER SYSTEM: A SET OF ARRANGEMENTS THROUGH WHICH THE BIOLOGICAL RAW MATERIAL OF HUMAN SEX AND REPRODUCTION IS SHAPED BY HUMAN AND SOCIAL INTERVENTION AND CONVENTIONALLY SATISFIED, REGARDLESS OF HOW BIZARRE SOME OF THESE CONVENTIONS MAY SEEM.
>
> AT THE MOST GENERAL LEVEL, THE SOCIAL ORGANIZATION OF SEX RESTS UPON GENDER, COMPULSORY HETEROSEXUALITY, AND THE COERCION OF FEMALE SEXUALITY. GENDER IS A SOCIALLY IMPOSED DIVISION OF THE SEXES. IT IS A PRODUCT OF THE SOCIAL RELATIONS OF SEXUALITY.

Based on this initial concept, Rubin (1993, p. 13) uses Lévi-Strauss's kinship theories: "o tabu do incesto, a heterossexualidade obrigatória e uma divisão assimétrica dos sexos. A assimetria de gênero — a diferença entre quem faz a troca e o objeto da troca — acarreta coerção sobre a sexualidade feminina"[10] and relates them to Freudian theories:

> A precisão com que Freud e Lévi-Strauss se combinam é tocante. Os sistemas de parentesco requerem uma divisão dos sexos. A fase edipiana divide os sexos. Os sistemas de parentesco incluem conjunto de regras governando a sexualidade. A crise edipiana é a assimilação destas regras e tabus. A heterossexualidade obrigatória é o produto do parentesco. A fase edipiana constitui o desejo heterossexual. O parentesco baseia-se numa diferença radical entre os direitos dos homens e das mulheres. O complexo edipiano confere direitos masculinos ao menino, e obriga a menina a contentar-se com seus direitos diminuídos.

[...]

Diversos elementos da crise edipiana teriam que ser alterados de maneira que a fase não tenha efeitos tão desastrosos sobre o ego da jovem mulher. A fase edipiana institui uma contradição na menina, ao colocar exigências irreconciliáveis sobre ela. Por um lado, o amor da menina por sua mãe está induzido pelo trabalho da mãe ao cuidar da criança. A menina é então obrigada a abandonar este amor por causa do papel sexual feminino: pertencer a um homem. Se a divisão sexual do trabalho fosse tal que adultos de ambos os sexos tomassem conta das crianças igualmente, o objeto primário de escolha seria bissexual. Se a heterossexualidade não fosse obrigatória, este amor precoce não deveria ser reprimido, e o pênis não seria supervalorizado. Se o sistema de propriedade sexual fosse reorganizado de tal maneira que os homens não tivessem direitos de supremacia sobre as mulheres (se não tivesse nenhuma troca das mulheres) e se não existisse o gênero, o drama edipiano por inteiro seria uma relíquia. Em suma o feminismo deve apelar para uma revolução no parentesco. (Rubin, 1993, p. 20)

The precision with which Freud's and Lévi-Strauss' ideas align is impressive. Kinship systems require a division of the sexes. The Oedipal phase divides the sexes. Kinship systems include a set of rules governing sexuality. The Oedipal crisis is the assimilation of these rules and taboos. Compulsory heterosexuality is the product of kinship. The Oedipal phase constitutes heterosexual desire. Kinship is based on a radical difference between the rights of men and women. The Oedipus complex grants masculine rights to the boy, and forces the girl to settle for her diminished rights.

[...]

> Several elements of the Oedipal crisis would need to be altered so that the phase does not have such disastrous effects on the young woman's ego. The Oedipal phase institutes a contradiction in the girl, as it places irreconcilable demands upon her. On the one hand, the girl's love for her mother is induced by the mother's work in caring for the child. The girl is then forced to abandon this love because of the female sexual role: belonging to a man. If the sexual division of labor were such that adults of both sexes equally took care of children, the primary object of choice would be bisexual. If heterosexuality were not compulsory, this early love would not need to be repressed, and the penis would not be overvalued. If the sexual property system were reorganized in such a way that men did not have supremacy over women (if there were no exchange of women), and if gender did not exist, the entire Oedipal drama would be a relic. In short, feminism must call for a revolution in kinship.

The author (Rubin, 1993, p. 21) argues that Lévi-Strauss, in *As Estruturas Elementares do Parentesco* (*Les structures* élémentaires *de la parenté*), places kinship as an imposition of cultural organization upon the facts of biological procreation. It is a description of society that does not regard the human subject as abstract, without gender. The human subject, in his work, is always male or female. When the essence of the kinship system becomes the exchange of women between men, a theory of sexual oppression is implicitly constructed.

The "exchange of women" is a seductive and powerful concept. It is attractive as it places the oppression of women within social systems, rather than biology. It is certainly not difficult to find ethnographic and historical examples of the trafficking of women.

Women are given in marriage, won in battles, exchanged for favors, sent as tribute, traded, bought, and sold. Far from being confined to the "primitive" world, these practices seem only to become more affirmed and commercialized in "civilized" societies.

If men have been sexual subjects — exchangers — and women semi-sexual objects — presents — for most of human history, then many customs, clichés, and personality traits seem to make a lot of sense (among others, the curious custom of the father giving away the bride). The "exchange of women" is a shorthand for expressing that the social relations of a kinship system specify that men have certain rights over their female relatives and that women do not have the same rights over themselves or their male relatives. In this sense, the "exchange of women" is a profound perception of a system in which women do not have full rights over themselves.

The "exchange of women" is also a problematic concept. Since Lévi-Strauss argues that the incest taboo and the consequences of its application constitute the origin of culture, it can be inferred that the historical global defeat of women occurred with its origin. If his analysis is adopted in its pure form, the feminist movement must include a task even more burdensome than the struggle with men; it must seek to rid itself of culture and replace it with entirely new phenomena on the face of the earth (Rubin, 1993, p. 10).

Regarding Marxism, Rubin (1993, p. 3–4) assumes that, in its classical form, it has failed to fully express or conceptualize sexual oppression since, as a social theory, it is not very concerned with sex. The author continues, stating that attempts have been made to understand this oppression within this analysis, arguing that women serve as a reserve labor force for capitalism, that women's lower wages provide extra surplus value for a capitalist employer, that women serve the goals of capitalist consumerism in their role

as household consumption managers, and so on. However, there are studies that propose something more ambitious, which is to locate the oppression of women at the heart of capitalist dynamics by pointing out the relationship between domestic labor and the reproduction of the labor force.

Everything that needs to be done in terms of maintaining the health, life, and strength of a worker, so that the working class can be reproduced as such, for the continuous extraction of surplus value and the perpetuation of capitalism—i.e., preparing food, washing clothes, making beds, etc.—activities typically performed by women, who do domestic work, is linked to the global nexus of surplus value through the reproduction of the labor force. However, explaining the usefulness of women for capitalism is one thing; asserting that this utility explains the genesis of women's oppression is something quite different. Here, the analysis of capitalism fails to clarify many things about women and their oppression.

Scott (1989, p. 1053) states that feminists have in a more literal and serious vein begun to use "gender" as a way of referring to the social organization of the relationship between the sexes. She mentions that, in its most recent use, "gender" seems to have first appeared among American feminists who wanted to emphasize the fundamentally social nature of distinctions based on sex. The word indicated a rejection of the biological determinism implicit in terms like "sex" or "sexual difference." Gender also highlighted the relational aspect of normative definitions of femininity and would be a social category imposed upon a sexed body. The use of "gender" places emphasis on an entire system of relations that may include sex but is not directly determined by sex nor does it directly determine sexuality.[11]

The author (Scott, 1989) also points out that the term "gender," in its simpler and earlier use, was employed as a synonym for

"women." The term "women" was replaced by "gender" in the titles of academic papers to convey a sense of erudition and seriousness, as "gender" was considered to carry a more objective and neutral connotation than "women." In this way, "gender" entered the scientific terminology of the social sciences and became dissociated from the politics of feminism. "Gender" includes women without explicitly naming them and thus appears not to pose a critical threat. Finally, Scott states that this use of "gender" can be understood as part of the quest for academic legitimacy by feminist studies during the 1980s.

Scott (2016, p. 9) states that feminist historians primarily draw on three theoretical positions: the first is an entirely feminist effort to explain the origins of patriarchy; the second aligns with the Marxist tradition; and the third, situated between French post-structuralism and Anglo-American object relations theories, draws on various schools of psychoanalysis to explain the production and reproduction of the subject's gender identity.

In Brazil, within the realm of social sciences, the contribution of Heleieth Saffioti (2009a, p. 23) deserves recognition for her decades of research and studies in the field of gender relations, while maintaining that gender does not replace patriarchy:

> O concurso dos homens é fundamental, uma vez que se trata de mudar a relação entre homens e mulheres. Todavia, é a categoria dominada-explorada que conhece minuciosamente a engrenagem patriarcal, no que ela tem de mais perverso. Tem, pois, obrigação de liderar o processo de mudança. Recusando-se, no entanto, a enxergar o patriarcado ou recusando-se a admiti-lo, a maioria das teóricas feministas dá alguns passos para trás.[12]

> THE INVOLVEMENT OF MEN IS FUNDAMENTAL, AS THE AIM IS TO CHANGE THE RELATIONSHIP BETWEEN MEN AND WOMEN. HOWEVER, IT IS THE DOMINATED-EXPLOITED CATEGORY THAT KNOWS THE PATRIARCHAL MECHANISM IN ITS MOST PERVERSE ASPECTS IN DETAIL. THEREFORE, IT HAS THE OBLIGATION TO LEAD THE PROCESS OF CHANGE. BY REFUSING, HOWEVER, TO RECOGNIZE PATRIARCHY OR TO ADMIT ITS EXISTENCE, THE MAJORITY OF FEMINIST THEORISTS TAKE SEVERAL STEPS BACKWARD.

The author delves into gender research when addressing the ontogenesis of gender, arguing that, in attempting to challenge biological essentialism, a form of social essentialism was embraced. She contends that the human being constitutes a unified and indivisible totality. Feminists aligned with social essentialism began referring to those feminists who regarded the body as significant as feminists of sexual difference:

> O gênero, socialmente construído, se assenta no sexo, situado no campo biológico, na esfera ontológica orgânica. Compreendida desta forma, a postura das chamadas feministas da diferença sexual, com frequência negativamente avaliadas, ganha novo significado.
> [...]
> O gênero independe do sexo apenas no sentido de que a sociedade não se apoia necessariamente nele para proceder à modelagem do agente social. Há, no entanto, um vínculo orgânico entre gênero e sexo, ou seja, o vínculo orgânico que torna as três esferas ontológicas uma só unidade, sendo indubitável que cada uma delas não pode ser reduzida à outra. Obviamente, o gênero não se reduz ao sexo, da mesma

forma como é impensável o sexo como fenômeno puramente biológico. (Saffioti, 2009b, p. 1).

Gender, socially constructed, is based on sex, which is situated in the biological field, within the organic ontological sphere. Thus, the stance of so-called feminists of sexual difference, often negatively assessed, takes on new significance.

[...]

Gender is independent of sex only in the sense that society does not necessarily rely on it to shape the social agent. However, there is an organic link between gender and sex—an organic connection that unites the three ontological spheres into a single entity, making it undeniable that none of these spheres can be reduced to another. Clearly, gender is not reducible to sex, just as it is inconceivable to regard sex as a purely biological phenomenon.

Contardo Calligaris (2018, january 25) raises the thesis that *a doença é que nossa cultura, há 3.000 anos (desde as histórias de Eva e de Pandora), é fundada no ódio à mulher, como encarnação do mal e voz tentadora do demônio. Ou seja, a misoginia (o ódio pelas mulheres) está no centro de nossa cultura* [the issue is that our culture, for 3,000 years (since the stories of Eve and Pandora), has been founded on hatred of women, as the embodiment of evil and the tempting voice of the devil. In other words, misogyny (the hatred of women) is at the core of our culture]. He continues:

> O único livro que eu conheço sobre a misoginia de nossa cultura é o excelente "Misogyny - The World's Oldest

Prejudice" (misoginia, o preconceito mais antigo do mundo), de Jack Holland (Robinson, 2006).

Holland constata: "O mito da criação como é contado no Gênesis está agora no centro das crenças de 2 bilhões de cristãos em 260 países – ou seja, um terço da população do mundo herdou um mito que culpa as mulheres pelos males e os sofrimentos dos homens" (p. 68).

E, Holland observa, a figura de Eva, cúmplice da serpente e tentadora de Adão (que se perde por causa dela), não é uma exclusividade judeu-cristã: Pandora, a primeira mulher mortal da mitologia grega, também não respeita uma proibição divina e é causa de todos os males entre os homens.

Começa assim uma espécie de paranoia que está no senso comum: precisamos perseguir as mulheres para puni-las (por causa delas fomos expulsos do paraíso) e porque elas são as tentadoras –representantes do demônio e do mal. (p. 68)

The only book I know about the misogyny in our culture is the excellent 'Misogyny - The World's Oldest Prejudice' by Jack Holland (Robinson, 2006).

Holland states: 'The creation myth as told in Genesis is now at the center of the beliefs of 2 billion Christians in 260 countries – that is, a third of the world's population has inherited a myth that blames women for the evils and suffering of men' (p. 68).

And, Holland observes, the figure of Eve, accomplice of the serpent and tempter of Adam (who falls because of her), is not a Jewish-Christian exclusive: Pandora, the first mortal woman in Greek mythology, also violates a divine prohibition and is the cause of all the evils among men.

Thus begins a kind of paranoia that is embedded in common sense: we need to persecute women to punish

> them (because of them we were expelled from paradise) and because they are the temptresses – representatives of the devil and evil. (p. 68).

All this history of the oppression of women and gender, within a patriarchal system, is a key piece in understanding the criminalization of women who have self-induced abortions. A woman who has a self-induced abortion, above all, denies motherhood, denies her identification as a mother and confinement to the private sphere. By having a self-induced abortion, she intends to regain control over her body, her desires, and choices. This is why the expression "gender discrimination", "gender oppression", and not "women's' oppression" is so important. Although the criminalization of abortion refers to a specific sexed body capable of gestation (a pregnant body), since sexuality and reproduction are relational, the limitations endured and imposed on women's bodies are a result of these relationships constructed between the sexed bodies of men and women. Therefore, it is not just a matter of "women" or something that concerns only "women."

In this regard, Joan Scott (1986, p. 1056) states: ""Gender" as a substitute for "women" is also used to suggest that information about women is necessarily information about men, that one implies the study of the other." This usage insists on the idea that the world of women is part of the world of men, that it is created within and by this world. It rejects the interpretative validity of the idea of separate spheres and argues that studying women separately perpetuates the myth that one sphere, the experience of one sex, has little or nothing to do with the other sex. The author continues (p. 1067), stating that the essential core of her definition of gender is based on the integral connection between two propositions: gender is a constitutive element of social relations based on perceived differences between the sexes,

and it is a primary way of signifying power relations. Gender would involve four interconnected elements: culturally available symbols; normative concepts; political character; and subjective identity.

The great achievement of gender as an analytical category is to highlight the political, social, and cultural aspects involved in the sexual subjectivation of individuals, showing how sex and gender are interrelated, intertwined. However, the category of gender goes a step further, in the sense that what is constructed can be altered, and gender relations can be reinvented in an egalitarian way. Hence, the importance of understanding the sex/gender system within the patriarchal structure, without abandoning the concept of patriarchy for understanding the oppression of women, especially those who provoke abortions.

The gender theory contributes to the discussion of the duty to decriminalize abortion by allowing the questioning of a supposed natural duty of motherhood, as something stemming from the nature that characterizes "being a woman," as if no judgment should be made by women, but merely the possibility of accepting it. It also allows for understanding motherhood from a social and cultural perspective, thus questioning the supposed obligatory nature of motherhood.

The gender theory developed by feminists enables understanding the socially constructed oppressions and challenges a binary social system built from biological sex and biological differences.

Building upon gender theory and further problematizing the assignment of masculinity to a male sexed body and femininity to a female sexed body, queer theory emerges, discussed in this work due to its power to further blur these differences that begin with the assumption of an supposedly immutable nature. The queer theory, addressed in the next chapter, challenges the binary of gender and gender identities, including motherhood, which is necessarily related to women from a biological standpoint.

How can we understand, in terms of non-oppression, the choices of a transgender individual who socially defines themselves as a man, desires to be a mother, is biologically able to do so, and wants to be listed as the father on the child's birth certificate, as that is how they see themselves, feel, and identify? The fluidity of sex/gender developed by queer theory can offer new perspectives on the sex/gender system and its implications, particularly regarding compulsory motherhood as an identifier of women, as well as for reflection on the criminalization of abortion as a form of control over women's sexuality, as will be seen next:

1.1.2 Queer theory as a possibility for overcoming the binary identity that penalizes the sexed body considered feminine

> *Ana denied being pregnant in her statement to the police. She had fibroids. She took Dorflex for pain, which increased her blood pressure, and she experienced heavy bleeding, fainting while leaving the apartment. She asked for help from her neighbor, who called the police. Both the police officer and the neighbor reported hearing her tell the officer that she had taken Cytotec and had an abortion. The Legal Medical Institute (IML) requested the medical report from the emergency room, which stated that it was a case of abortion and that the patient had inserted 4 Cytotec tablets into her vagina. The emergency room sent the report to the police investigation. She was charged and accepted the conditional discontinuation of criminal prposecution. She was not heard in court.*

From the moment queer theory begins to problematize the structures of the sex/gender system, denying the gender binary and enabling the so-called 'dispossession of gender,' it is clear that

a step forward is taken in relation to the possibility of destabilizing the rigid binary gender structures that underlie the penalization of the sexed body considered feminine. This deconstruction of the body and gender initiated by queer theory only contributes to the liberation of the bodies of both women and men. Theories of recognition were concerned with the possession of identity, gender, and sex, while queer theory focuses on the dispossession of gender. Joan Scott (1986, p. 1063-1064) emphasizes that:

> [...] the principle of masculinity is based on the necessary repression of feminine aspects – the subject's bisexual potential – and introduces conflict into the opposition between the masculine and the feminine. Repressed desires are present in the unconscious and constitute a permanent threat to the stability of gender identification, denying its unity and subverting its need for security. Moreover, the conscious ideas of masculine and feminine are not fixed, as they vary according to contextual use. Therefore, there is always a conflict between the subject's need for an appearance of totality and the imprecision of terminology, the relativity of its meaning, and its dependence on repression. This type of interpretation renders the categories of 'man' and 'woman' problematic, suggesting that masculinity and femininity are not inherent characteristics but rather subjective (or fictitious) constructions. This interpretation also implies that the subject is in a constant process of construction and offers a systematic means of interpreting conscious and unconscious desire, referring to language as an appropriate place for analysis.

Judith Butler is the author who deeply examines this problematization of binary gender identity, being one of the leading queer theorists. In this regard, the following statement is particularly relevant:

> The presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex whereby gender mirrors sex or is otherwise restricted by it.When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and f*eminine* a male body as easily as a female one. (Butler, 1999, p. 10)

This "gender performativity", or "gender expression", enables new relationships with corporeality, establishing new possibilities for bodily forms, sexual identification, and gender.

> Neste sentido, em uma perspectiva estritamente hegeliana, ser reconhecido pelo Outro não implica ter assegurado meus predicados e atributos. Antes implica encontrar no outro a opacidade da infinitude que me constitui ao mesmo tempo que me escapa e a respeito da qual só posso voltar a ter alguma experiência à condição de me aceitar ser despossuído. (Safatle, 2015, p. 182)

> In this sense, from a strictly Hegelian perspective, being recognized by the Other does not imply having my predicates and attributes guaranteed. Rather, it implies encountering in the Other the opacity of the infinitude that simultaneously constitutes me and escapes me, and about which I can only regain some experience on the condition that I accept being dispossessed.

Rubin (1993, p. 22), one of the pioneers in gender studies within the social sciences, had already pointed out the elimination of the oppression of compulsory sexualities, stating that women are not

only oppressed as women; they are also oppressed by having to be women — or men, depending on the case. The author also argued that the feminist movement should aspire to more than just eliminating the oppression of women. It should aim for the elimination of compulsory sexualities and mandatory gender roles. The dream that Rubin found fascinating was that of an androgynous and genderless society (though not sexless), where each person's anatomy would be irrelevant to who they are, what they do, or whom they love.

In the field of psychoanalysis, an important contribution is Maria Rita Kehl's (1996) interpretation of Freud, which, in the end, discusses a minimal difference between women and men, between the masculine and the feminine, from the perspective of the constitution of subjectivities:

> As identidades são as próteses subjetivas produzidas nas sociedades de massas. A afirmação das diferenças constituídas como formação de grupos identitários tem produzido mais intolerância que diálogo e a convivência na diversidade. Porém a marca identitária não dá conta de toda a subjetividade. A pertinência a um grupo não define, necessariamente, para os indivíduos os caminhos a serem percorridos pelo desejo. (Kehl, 1996, p. 12-13).

> Identities are the subjective prostheses produced in mass societies. The assertion of differences constituted as the formation of identity groups has produced more intolerance than dialogue and coexistence in diversity. However, the identity label does not account for all of subjectivity. Belonging to a group does not necessarily define the paths to be followed by an individual's desires.

Thinking in this way would, according to the author, be a form of contemporary alienation. There must always be particularities:

> Feminilidade(s) e masculinidade(s), vamos encontrá-los distribuídos entre homens e mulheres em combinações tão variadas, que no limite poderíamos pensar numa sexualidade para cada indivíduo.
> Não se trata aqui de reivindicar uma "igualdade", à maneira dos movimentos feministas contemporâneos, mas de constatar – o que é muito menos confortável – uma indiscriminação entre os campos masculino e feminino, tornada evidente nas pós-modernidade, quando um relaxamento na repressão (não no recalque) imposta pelos costumes deixa de produzir as diferenças aparentemente "fundamentais" entre homens e mulheres. O desconforto provém da constatação de que a aproximação entre estes campos produz muito mais intolerância do que diálogo, muito mais rivalidade do que desejo.
> "Narcisismo das pequenas diferenças": é quando a diferença é pequena, e não quando é acentuada, que o outro se torna alvo de intolerância". (Kehl, 2016, p. 13-14).

> Femininity and masculinity are distributed across men and women in such varied combinations that, following an extreme line of thought, one could consider a distinct sexuality for each individual.
> This is not about claiming 'equality' in the way contemporary feminist movements do, but about acknowledging — something much less comfortable — a lack of distinction between the masculine and feminine fields, made evident in postmodernity, when a relaxation in repression (not in suppression) imposed by customs ceases to produce the seemingly 'fundamental'

> differences between men and women. The discomfort arises from the realization that the closeness between these fields creates much more intolerance than dialogue, much more rivalry than desire.
> 'The narcissism of small differences': it is when the difference is small, and not when it is accentuated, that the other becomes the target of intolerance."

Kehl (2016, p. 23), in a later work, discusses the belonging to identity groups laden with imaginary meanings, as the first definition of a child, given even before the fetus completes its development, thanks to current ultrasonographic investigation methods, is to be classified as "boy" or "girl." These symbols indicate not only an anatomical difference but also the belonging to one of two identity groups laden with imaginary meanings.

The queer theory seeks to expand the possibilities of being and existing in the world, embracing the most diverse forms of identity expression, bringing multiple differences without crystallizing them, but valuing them equally.

Thinking about "performativity" with Butler, "minimal difference" with Kehl, "opacity" and "dispossession" with Safatle, can contribute to thinking more like human beings (so alike and so different in this equality), without being imprisoned by certain identity traits that, most often, serve as another reason for oppression. This is what happens with mandatory motherhood and the control of sexualities, undermining the possibilities of emancipation for both women and men.

Queer theory is still very new and developing, but it will be a great ally in deepening the concept of "gender" as a category for analyzing and understanding human relationships, permeated by corporeality,

which increasingly distances itself from rigid or stereotyped patterns, allowing the questioning of what was once considered natural and unquestionable. Questioning and problematizing bodies, sexes, genders, sexuality, and motherhood allows for the exploration of other paths that lead to less oppression, tolerance, and transformative coexistence, based on the experience of living with many differences.

It is possible to think about Law from this dialectical perspective, from this feminist and emancipatory lens. Emancipation will never come solely for women, as it concerns social relations of gender. Emancipating women means emancipating all human beings.

However, there are opposing schools of thought, and abortion, as already mentioned, is one of the most controversial topics. Both gender theory and queer theory seek to understand human relationships, shaped by sexed bodies, gender identities, and many other intersections (race, ethnicity, age, social class, etc.), while avoiding all forms of oppression so that constitutional social values, such as equality, tolerance, diversity, and human dignity, can be achieved.

Nevertheless, there are schools of thought that intend to challenge these theories, contributing to the maintenance and deepening of gender, race/ethnicity, and sexual orientation oppressions. The term "gender ideology" was created to refer to gender theory or to the term "gender" as an analytical category, in order to attribute concepts, definitions, and purposes that never existed or were claimed by the theorists above.

Based on the attack against what is referred to as "gender ideology," efforts are being made to promote agendas that disregard women's human rights. These include proposals aimed at maintaining the criminalization of abortion. Additionally, these agendas seek to perpetuate gender discrimination and stereotyped roles. Such actions prevent women from establishing themselves as autonomous

individuals, capable of making moral decisions with responsibility and awareness, as will be discussed in the next chapter.

1.2 "GENDER IDEOLOGY" AND THE ABSOLUTE CRIMINALIZATION OF ABORTION IN BRAZIL

Up to this point, the importance of gender theory and queer theory in understanding the oppressions that characterize social relations has been developed, especially those that affect women and hinder the full exercise of their human rights in criminal legislation, which criminalizes abortion in Brazil in most cases.

The expression "gender ideology" has gained prominence in discussions about educational plans and the articulation of several sectors, heavily influenced by religious interests, aiming to remove terms like "gender" and "sexual orientation," among others, from National, State, and Municipal Education Plans.

Based on the term "gender ideology," several concepts are referred to, incorrectly, in a way that shocks public opinion and, more than that, confuses rather than clarifies. This creates a bundle of ideas that completely distort gender theory and its contribution to respecting women and men in their multiple diversities, whether racial, ethnic, sexual orientation, gender identity or expression, age, social class, and many other subjective markers and interpersonal and social relationships.

Therefore, it is crucial, before delving into the meaning of what has been referred to as "gender ideology," to explain and historically contextualize certain terms, such as: "sex," "gender," "gender identity," and "sexual orientation," which are interconnected in this discussion,

to confront statements such as: "gender ideology is against the family"; "gender ideology wants boys to become girls and vice versa"; "gender ideology supports abortion, which is the murder of innocent children in the womb"; "gender ideology advocates same-sex unions, which are against nature," among others.

As Silvia Pimentel (2017, p. 1) clarifies, the term "gender" represents a historical and dynamic concept with several meanings, and it is a central theme in feminist movements and theories. It is this perspective, built under feminism, that is important to analyze abortion. Feminist studies were the ones that most extensively appropriated this category in their analyses across various fields of knowledge. The author opts to demonstrate the historicity of the concept of gender through three periods that she names the "three waves of feminism." Regarding the first wave, which spanned from the late 19th century to around 1950, the author states:

> No período, sexo e gênero são considerados de origem biológica, geneticamente herdados e imutáveis, tanto pelas características físicas como pelas sociopsicológicas que distinguem o macho da fêmea; o masculino do feminino. Sexo e gênero são considerados como categorias distintas, mas o gênero se vincula diretamente ao sexo. Por essa razão, o conceito abarca apenas a binariedade. (Pimentel, 2017, p. 5).

> In this period, sex and gender are considered of biological origin, genetically inherited and immutable, both through physical and sociopsychological characteristics that distinguish male from female; masculine from feminine. Sex and gender are considered distinct categories, but gender is directly linked to sex. For this reason, the concept only encompasses the binary.

It is in the second wave of feminism, which spanned from 1960 to 1990, that the distinction between sex and gender appears:

> A teoria essencialista sobre gênero – e respectivo determinismo biológico – é criticada pelos construcionistas sociais, que ressaltam os aspectos relacionais como dimensão fulcral de gênero. Gênero passa a dizer respeito a todo aparato construído pela sociedade, antes mesmo de nascermos, e reiterado ao longo da vida: cores, brinquedos, roupas, profissões, comportamentos, performances esperadas; refere-se ao "feminino" e ao "masculino". Sexo, por sua vez, é um conceito ligado à biologia. Designa somente a caracterização genética e anátomo-fisiológica dos seres humanos. Refere-se ao genital e às características específicas e biológicas dos aparelhos reprodutores feminino e masculino, ao seu funcionamento e aos caracteres sexuais secundários decorrentes dos hormônios. O conceito de gênero aprimora-se como construção social, e inúmeras teorias sofisticadas sobre o tema foram desenvolvidas a partir da crítica em relação à naturalização das desigualdades entre homens e mulheres. Desenvolveram-se reflexões filosóficas e jurídicas, como também pesquisas na área das ciências sociais tais como história, sociologia, antropologia e ciência política. (Pimentel, 2017, p. 7).

> The essentialist theory of gender – and its corresponding biological determinism – is criticized by social constructionists, who emphasize relational aspects as the core dimension of gender. Gender comes to refer to the entire apparatus constructed by society, even before we are born, and reiterated throughout life: colors, toys, clothes, professions, behaviors, expected performances; it refers to the "feminine" and the

> "masculine." Sex, on the other hand, is a concept tied to biology. It designates only the genetic and anatomical-physiological characterization of human beings. It refers to the genitalia and the specific biological characteristics of the female and male reproductive systems, their functioning, and the secondary sexual characteristics resulting from hormones. The concept of gender is refined as a social construction, and numerous sophisticated theories on the subject have been developed through critique of the naturalization of inequalities between men and women. Philosophical and legal reflections were developed, as well as research in the field of social sciences such as history, sociology, anthropology, and political science.

The two previous historical moments are always organized around a binary structure, whether of sex (woman/man) or gender (feminine/masculine). In the first moment, gender, as a social role, was tied to biological sex. Thus, several characteristics related to biological sex would naturally derive from it. That is, boys would be objective, rational, aggressive, assertive, and would like the color blue, while girls would be naturally subjective, sensitive, emotional, gentle, and would prefer the color pink.

In the second moment, the differentiation between gender and sex symbolized a break from a model that crystallized gender, as a social role, into biological sex.

Due to this gender oppression, the political and legal claim arises that potential differences should not become inequalities according to their sex, since no one is born enjoying to play with dolls or cars, or preferring the color blue over pink. Many characteristics considered inherent to each sex are, in fact, learned throughout the long process of socialization,

which starts in the family, continues in school, and in other institutions that individuals become part of throughout their lives.

The key reference for the feminist movement is the opposition to the social, political, cultural, and legal structures that dictate specific roles and functions for women, which they do not always wish to fulfill. It also involves challenging the model in which differences considered natural and immutable serve as support for the patriarchal system and the subordination of women in all spheres of life. Moreover, it rejects the model in which differences, in the case of women, mean devaluation, limitations and subordination in relation to men.

From the moment sexual difference translates into unequal legal treatment and the male sex becomes the "model of humanity," as noted by Alda Facio and Lorena Fries (1999, p. 6), it becomes evident that the law, as a product of its time and specific culture, reflects the unequal treatment of the sexes, with no neutrality whatsoever.

According to the authors, what enables this critical perspective on the patriarchal structure is feminism—as a social and political movement, an ideology, and a theory—rooted in the collective awareness of women as a subordinated, discriminated, and oppressed group by the collective of men in patriarchy.

Gender studies and the concept of gender gained significant momentum in the second half of the 20th century, as previously discussed in the chapter addressing gender oppression specifically.

This paves the way for a use of gender that Silvia Pimentel (2017, p. 10) associates with the third wave of feminism, one dissociated from sex and sexuality. In this phase, space is created for new gender identities and even the idea of deconstructing gender identity, replacing it with the notions of fluidity and gender performances.

A feminine gender expression may be based on female biological sex or not, just as a masculine gender expression may be based on

female biological sex or not. Thus, gender moves away from the binary nature of sex to allow for other possibilities of "gender identity" that do not necessarily fit into the categories of "man/woman."

Judith Butler (1999, p. 10) is a contemporary author who critically examines and challenges the binary construction of gender identity:

> Assuming for the moment the stability of binary sex, it does not follow that the construction of "men" will accrue exclusively to the bodies of males or that "women" will interpret only female bodies. Further, even if the sexes appear to be unproblematically binary in their morphology and constitution (which will become a question), there is no reason to assume that genders ought also to remain as two.

Judith Butler's[13] deconstruction of gender binarity will allow for the acceptance of a multiplicity of gender expressions, as previously discussed.

The terms "sex," "gender," "gender expression," and "gender identity" have already been addressed in this work. Another term that is frequently associated with the debate on gender ideology is "sexual orientation." This refers to the manifestation of sexuality, sexual and emotional attraction, desires, and libido, allowing for classifications such as heterosexual, homosexual, bisexual; there are also individuals who define themselves as not interested in erotic encounters with others, sometimes referred to as asexuals.

Beatriz Pereira da Silva (2017, p. 3, emphasis added) summarizes the concepts discussed so far in a very clear manner:

> **Sexo** é um conceito ligado à biologia; é o termo descritivo de genitália (pênis/vagina) e gênero é uma construção social que é utilizada como uma das explicações para a desigualdade entre homens e mulheres (feminino/masculino). O **gênero**

diz respeito a todo o aparato construído pela sociedade antes mesmo de nascermos e reiterado ao longo da vida: cores, roupas, profissões, comportamentos, performances esperadas, dentre outras características. **Orientação sexual** concerne à atração física e afetiva que uma pessoa pode sentir por outra (heterossexuais, homossexuais, bissexuais...) e **identidade de gênero**, de acordo com os Princípios de Yogyakarta "é experiência interna, individual e profundamente sentida que cada pessoa tem em relação ao gênero, que pode, ou não, corresponder ao sexo atribuído no nascimento, incluindo-se aí o sentimento pessoal do corpo (que pode envolver, por livre escolha, modificação da aparência ou função corporal por meios médicos, cirúrgicos ou outros) e expressões de gênero, inclusive o modo de vestir-se, o modo de falar e maneirismos".

Sex is a concept tied to biology; it is a descriptive term for genitalia (penis/vagina), whereas **gender** is a social construct used as one of the explanations for the inequality between men and women (feminine/masculine). Gender refers to the entire framework built by society even before we are born and reinforced throughout life: colors, clothes, professions, behaviors, expected performances, and other characteristics. **Sexual orientation** concerns the physical and emotional attraction a person may feel for another (heterosexual, homosexual, bisexual, etc.), and **gender identity**, according to the Yogyakarta Principles, "is the internal, individual, and deeply felt experience that each person has in relation to gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, by free choice, modification of appearance

> OR BODY FUNCTION THROUGH MEDICAL, SURGICAL, OR OTHER MEANS) AND GENDER EXPRESSION, INCLUDING THE WAY ONE DRESSES, SPEAKS, AND DISPLAYS MANNERISMS."

The author also defines that "transgender people are those whose biological sex does not correspond to the gender identity assigned to them at birth. Under this concept, there are various identities: travestis[14], androgynous individuals, drag queens, and transsexuals" (Silva, 2017, p. 4).

A study conducted in 2012, under the framework of the Organization of American States (OAS), by the Inter-American Commission on Human Rights (IACHR), titled *Orientación Sexual, Identidad de Género y Expresión de Género: algunos términos y estándares relevantes*, presents a series of definitions and concepts along with their legal implications:

> **Sexo [Sex]**
> En un sentido estricto, el término "sexo" se refiere "a las diferencias biológicas entre el hombre y la mujer", a sus características fisiológicas, a "la suma de las características biológicas que define el espectro de los humanos personas como mujeres y hombres" o a "la construcción biológica que se refiere a las características genéticas, hormonales, anatómicas y fisiológicas sobre cuya base una persona es clasificada como macho o hembra al nacer".
> **Personas intersex [Intersex People]**
> Desde la perspectiva del sexo, además de los hombres y las mujeres, se entiende que se alude también a las personas intersex. En la doctrina se ha definido la intersexualidad como "todas aquellas situaciones en las que el cuerpo sexuado de un individuo varía respecto al standard de corporalidad femenina o masculina culturalmente vigente". Históricamente la

comprensión de esta identidad biológica específica se ha denominado a través de la figura mitológica del hermafrodita, la persona que nace "con 'ambos' sexos, es decir, literalmente, con pene y vagina". [...]

Género [Gender]

La diferencia entre sexo y género radica en que el primero se concibe como un dato biológico y el segundo como una construcción social. El Comité de Naciones Unidas que monitorea el cumplimiento con la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer (CEDAW [...]) ha establecido que el término «sexo» se refiere a las diferencias biológicas entre el hombre y la mujer, mientras que el término «género» se refiere a las identidades, las funciones y los atributos construidos socialmente de la mujer y el hombre y al significado social y cultural que se atribuye a esas diferencias biológicas.

La orientación sexual [Sexual Orientation]

La orientación sexual de una persona es independiente del sexo biológico o de la identidad de género. Se ha definido como "la capacidad de cada persona de sentir una profunda atracción emocional, afectiva y sexual por personas de un género diferente al suyo, o de su mismo género, o de más de un género, así como a la capacidad mantener relaciones íntimas y sexuales con estas personas". En el derecho comparado se ha entendido que la orientación sexual es una categoría sospechosa de discriminación, para lo cual se han utilizado distintos criterios, que incluye la inmutabilidad de ésta "entendiendo por inmutabilidad una característica difícil de controlar de la cual una persona no puede separarse a riesgo de sacrificar su identidad".

En esta perspectiva se ubican los términos heterosexualidad, homosexualidad y bisexualidad [...].

La identidad de género [Gender Identity]

De conformidad con los Principios de Yogyakarta, la identidad de género es la vivencia interna e individual del género tal como cada persona la siente profundamente, la cual podría corresponder o no con el sexo asignado al momento del nacimiento, incluyendo la vivencia personal del cuerpo (que podría involucrar la modificación de la apariencia o la función corporal a través de medios médicos, quirúrgicos o de otra índole, siempre que la misma sea libremente escogida) y otras expresiones de género, incluyendo la vestimenta, el modo de hablar y los modale.

Dentro de la categoría identidad de género se incluye generalmente la categoría transgenerismo o trans.

Transgenerismo o trans [Transgenderism or trans]

Este término paragua – que incluye la subcategoría transexualidad y otras variaciones – es utilizado para describir las diferentes variantes de la identidad de género, cuyo común denominador es la no conformidad entre el sexo biológico de la persona y la identidad de género que ha sido tradicionalmente asignada a éste. Una persona trans puede construir su identidad de género independientemente de intervenciones quirúrgicas o tratamientos médicos.[15]

Transexualismo [Transsexualism]

Las personas transexuales se sienten y se conciben a sí mismas como pertenecientes al género opuesto que social y culturalmente se asigna a su sexo biológico y que optan por una intervención médica –hormonal, quirúrgica o ambas– para adecuar su apariencia física–biológica a su realidad psíquica, espiritual y social.

La expresión de género [Gender Expression]

La expresión de género ha sido definida como "la manifestación externa de los rasgos culturales que permiten identificar a una persona como masculina o femenina conforme a los patrones considerados propios de cada género por una determinada sociedad en un momento histórico determinado" (OEA, 2013, p. 3–5).

The movement against any reference to gender in schools fights what is called the "gender ideology" in education. It is a movement that seeks "neutral education",[16] preventing all forms of "ideological indoctrination" by teachers, especially regarding gender and sexuality topics. It is said to have started through a website in 2004 and adopted the name "*Escola sem Partido*" [Schools without Ideology].[17]

The book *A Ideologia do Movimento Escola sem Partido*, edited by the non-governmental organization *Ação Educativa*, accurately portrays, through various papers, the strategy of persecution, censorship, and denunciation of educators who dare to discuss gender and sexuality in schools. It also provides a model for an extrajudicial notice that threatens teachers who address gender and sexuality.

Leonardo Sakamoto (2016, p. 13) states that the Escola Sem Partido movement claims to have a battalion of indoctrination complaints but publishes only 33 on its website (detail: Brazil has 45 million students), and points out:

> Isso está muito longe de configurar uma tendência, que precisa de dados mais robustos e outros estudos comprovados que confirmem a hipótese. E tem outra coisinha: se existe doutrinação esquerdista, ela está dando muito errado – uma pesquisa Datafolha, de dois anos atrás, e o próprio mapa eleitoral das últimas eleições registram um avanço da direita e um recuo da esquerda.

> This is far from constituting a trend, which requires more robust data and further studies to confirm the hypothesis. And there's another thing: if leftist indoctrination exists, it's failing miserably – a Datafolha survey from two years ago and the electoral map from the latest elections show an advance of the right wing and a retreat of the left wing.

During the deliberation of the National Education Plan in 2014 (Brazil, 2014), one of the controversies raised concerned the promotion of equity in gender, race/ethnicity, region, and sexual orientation, which was ultimately excluded from the bill. Consequently, this influenced the development of state and municipal plans, driven by the thesis of combating "gender ideology" (Manhas, 2016, p. 16). Until then, most educators and other stakeholders in the educational field had never encountered the terms "gender ideology" or "ideological indoctrination" (Ximenes, 2016, p. 51).

But what exactly is this so-called "gender ideology" that, according to this movement, is said to be indoctrinating children in schools?

This is explored in a book organized by the Union of Catholic Jurists of São Paulo, entitled *Ideologia de Gênero* [Gender Ideology], which gathers 12 papers on the topic, all written by legal experts and members of the association. One of the coordinators states that:

> O certo é que a ideologia de gênero busca negar a natureza. Busca criar uma "nova natureza" não biológica, lastreada na manipulação da consciência da juventude, ao sustentar que as crianças nascem sem sexo definido, devendo escolher o gênero que desejam adotar, ainda quando crianças.
>
> Esta primeira premissa é uma fantástica mentira, apregoada, no melhor estilo de Goebbels, por tantos quantos querem promover a proliferação da homossexualidade, levando crianças a fazerem opções em assuntos nos quais não tem condições de optar.
>
> [...]
>
> E do ponto de vista católico apostólico romano, sustentar que os gêneros (masculino e feminino) não existem, sendo uma opção a ser tomada pela criança, representa além de desrespeito, odiosa manipulação da consciência dos jovens, impedindo-os, inclusive, de promover a real defesa de valores familiares, os

quais pressupõem vínculos de responsabilidade e de afeto, que no plano sexual, possam gerar proles, *naturalmente*. (Martins, 2016, p. 5 and 7, emphasis by the author).

The ideology of gender seeks to deny nature, aiming to create a "new nature" that is non-biological and grounded in the manipulation of young minds. It argues that children are born without a defined sex and should choose the gender they wish to adopt, even at a young age. This initial premise is an outrageous falsehood, propagated, in the style of Goebbels, by those who wish to promote the proliferation of homosexuality, encouraging children to make choices in matters for which they are not yet equipped.

[...]

From the perspective of Roman Catholicism, asserting that genders (male and female) do not exist and are merely options for children to choose represents, beyond disrespect, a reprehensible manipulation of young minds. This manipulation hinders them from genuinely defending family values, which are based on bonds of responsibility and affection and, in the sexual realm, *naturally* result in procreation.

It is evident that the author fails to differentiate between gender, gender identity, gender expression, and most concerningly sexual orientation. According to their reasoning, proponents of "gender ideology" aim to influence children to become homosexual and, in doing so, destroy the family, which the author only recognizes in the context of individuals capable of naturally conceiving children, i.e., a man and a woman.

In the same work, another author, also conflating concepts, states that, regarding gender ideology, *nessa visão, qualquer que seja o sexo, um indivíduo, poderia escolher e construir socialmente seu gênero: um homem poderia optar pela heterossexualidade, homossexualidade ou pela transexualidade* [in this perspective, regardless of sex, an individual could choose and socially construct their gender: a man could opt for heterosexuality, homosexuality, or transsexuality.] (Fernandes, 2016, p. 10). Again, gender identity is mistaken for sexual orientation as if they were interchangeable. For example, a male individual may identify as homosexual (sexual orientation) — feeling sexual and emotional attraction toward men—while simultaneously being content with their male gender identity, experiencing no discomfort or rejection regarding their sex, and thus not being transgender. In this case, their gender identity aligns with their biological sex, making them a cisgender person.

Some argue that gender ideology is unconstitutional, yet they fail to base their claims on any constitutional provisions:

> Escrevo inicialmente de forma absolutamente taxativa: a ideologia de gênero é algo diabólico! Não há adjetivo melhor para definir a ideologia de gênero do que este: "diabólico". Sabemos todos que o diabo é o pai da mentira e que a mentira se opõe à Verdade, algo próprio de Deus, logo a adjetivação cabe como luva à mão ao conceito de ideologia de gênero. (Cremoneze, 2016, p. 36).

> I begin by stating in the most unequivocal terms: gender ideology is something diabolical! There is no better adjective to define gender ideology than this: "diabolical." We all know that the devil is the father of lies and that lies oppose Truth, which is inherently

of God. Thus, this characterization fits the concept of gender ideology like a glove.

In summary, it can be said that the authors who use the term "gender ideology" in the context of the right to education debate are concerned with defending the idea that gender ideology represents a direct attack on the only family structure they recognize — one composed of a heterosexual, cisgender man and woman with natural offspring — and a denial of biological identity, which they regard as immutable and divinely ordained. "A *ideologia de gênero é uma técnica*, idealizada, em conjunto com fundações internacionais, pelos partidos de esquerda, que pretende, utilizando o sistema escolar, *abolir a família como instituição social*, em total violação à nossa Constituição de 1988 [*gender ideology is a technique*, conceived in collaboration with international foundations by left-wing parties, which aims to use the school system *to abolish the family as a social institution*, in total violation of our 1988 Constitution.] (Rodrigues, 2016, p. 129, emphasis added in the original text).

Also, it prevails the idea that through the use of this so-called ideology, people would no longer have a defined sex, ceasing to be men or women, and could freely choose their gender. The actual existence of homosexual, bisexual, transgender, and travesti individuals, among others, is framed as an aberration—a symbol of defiance by the creature against the Creator and His omnipotence in creating man and woman, ideally perfect in their union for the perpetuation of the species.

The use of the term "ideology" is intentional, and intends to emphasize the perceived falsity of such ideas that are seen as denying nature. One interpretation of "ideology" refers to it as illusion, false consciousness, or a set of distorted beliefs, suggesting that the ideologue is someone who manipulates reality (Carnio, 2009, p. 96). It may also

refer to a doctrine that lacks objective validity, acting as an obstacle to rational thought — ideology as a false belief. This is a negative and pejorative connotation that the term did not originally carry.[18]

From this perspective, the term "gender ideology" was coined to attribute to the concept of gender and gender studies, developed by numerous researchers across several fields of knowledge, the notion that they produce something false, illusory, and invalid, distorting reality. Those who advocate for the removal of the gender category from education and teaching practices argue that gender does not exist, is false, and illusory. What exists is biological sex, visible, tangible, natural, and immutable by human intervention.

As demonstrated in the first part of this book, the concept of gender and the gender studies conducted since the mid-20th century have nothing to do with what has been labeled as "gender ideology." What gender researchers have produced over the last 50 years of study is not about distorting reality; on the contrary, it seeks to understand it and to value human diversity as an essential component of life in society.

Gender studies are an essential science to understand sexism, particularly within the legal environment, where sexism manifests both in legislation and its interpretation. The criminalization of abortion, the mandatory nature of motherhood, which is seen as something natural and separate from human choice, and the control over women's sexual rights through abortion laws, can all be questioned and better understood through gender studies, which in no way constitute or can be labeled as "gender ideology."

Gender theory offers a critical perspective on Law and contributes effectively to the protection of women's human rights, particularly in relation to abortion, as will be explored in the second part of this book.

2

ABORTION AND THE FEDERAL CONSTITUTION OF 1988

2.1 RIGHT TO A SECULAR STATE: SECULARITY IN THE CONSTITUTION[19]

Marta took a bottle of something prepared by a woman at her request to induce an abortion. She picked it up the next day and paid 50 reais. She experienced heavy bleeding and was taken to the hospital by her mother.

The fetus was found in a vacant lot. It was not possible to determine who had left it there or the cause of death.

The fetus was found under a tree inside a shoebox. The mother was not located, and the cause of death could not be determined.

The fetus was discovered in the sewage box of a building during a cleaning operation. The identity of the person responsible or whether the abortion was induced could not be determined.

The fetus was found by outsourced Sabesp workers in a sewer system they were working on. There was no one nearby who knew anything.

The fetus was found by garbage collectors, who called the police before disposing of it in the truck. The pathological examination report indicated prematurity as the cause of death. The mother was not located.

Invariably, State secularism arises in discussions about abortion. This is because there are various movements, often with religious foundations,

that are relatively organized and opposed to the expansion of any new grounds for abortion and even advocate for total criminalization. This is also the official position of the Catholic Church in Brazil, expressed by the *Confederação dos Bispos do Brasil* [National Conference of Bishops of Brazil] (CNBB), as well as by some evangelical churches.[20]

The 1988 Brazilian Federal Constitution preserves a model of secular state, one that is detached from any religious affiliations. This model is essential to safeguard fundamental human rights and ensure a democratic, pluralistic state that respects diversity. The legal protection of sexual and reproductive rights, from a human rights perspective, has been constantly threatened in Brazil by the organized and persistent actions of religious groups that wield significant influence in the Legislative branch. A study titled *Religião e Política* (Vital & Lopes, 2012, p. 156) highlights that the so-called "*bancada crista*" [Christian front] accounts for nearly one-fifth of the deputies in the Federal Chamber.[21]

This conflict disproportionately affects women, given their central role in reproduction and the historical discrimination they face in exercising their sexuality, alongside the persistent social and political control over their bodies.

Pedro Salazar Ugarte (2008, p. 4) underscores that behind the project of secularism lies a powerful idea: that individuals are dignified beings with the right to live their lives autonomously and freely. In a secular state, no one has the right to interfere in actions related to private life, bodily integrity, sexuality, thought, or conscience. In the realm of sexuality and reproductive rights, this creates a tension between freedom and autonomy on one side and the dogmas of many religions on the other.

Recent rulings by the Brazilian Supreme Federal Court on the permissibility of terminating pregnancies involving fetuses with

anencephaly and conducting scientific research with embryonic stem cells have demonstrated that the secular nature of the state is a prerequisite for protecting a range of constitutional rights. These include freedom, autonomy, human dignity, health, family planning, and, notably, sexual and reproductive rights. These decisions had to address the intersection of these issues with significant resistance from religious groups or individuals who, although not officially affiliated with any church, approached the issues through a religious lens, often adopting moral and/or confessional perspectives.

The constitutional history of Brazil reveals that the country has not always been a secular state. Until the Proclamation of the Republic, in 1889, and the adoption of the Constitution of 1891, Brazil functioned as a Monarchical and Confessional State that recognized Catholicism as the official religion.

When a state officially adopts a religion, even if it aligns with the beliefs of a majority or dominant group, it inevitably commits itself to the principles, moral values, and ideologies of that group at the expense of others, including minority groups. A state grounded in democratic principles and the universal protection of fundamental rights cannot endorse or adopt any particular religion.

Religions undeniably constitute significant social and political forces, organizing themselves to shape their followers and attract new members through a specific set of moral values, rituals, and liturgies. A democratic state must recognize and protect freedom of religion, belief, and conscience as a fundamental right. This protection implies refraining from endorsing any specific religion as the state's own, ensuring that all individuals, including those who profess no religion, are free to exercise their beliefs without prejudice.

However, it has become increasingly common for religious groups to organize and attempt to impose their moral codes on the broader

community. They often pressure state institutions in various ways to adopt values that reflect their particular beliefs, sometimes at the expense of the collective good.

While religious codes of values often resonate within communities and are deeply embedded in cultural practices and experiences, the Law —through legislation, legal doctrine, and court decisions — may sometimes acknowledge and incorporate them[22]. Nonetheless, there must always be limits to the decisions of the majority. Even if a numerically significant and well-organized religious majority elects representatives to Parliament, the Executive branch, or other institutions and legitimately promotes its moral perspectives, minorities must find protection in the Constitution. This safeguard ensures the defense of their rights and freedoms and provides a means to resist the moral standards of a temporary majority.

In summary, the Brazilian Constitution of 1988, by establishing Brazil as a secular state, guarantees the freedom of belief and conscience for all individuals, without distinction, providing protection for vulnerable groups and minorities who, as part of the human element that constitutes the state, are not required to follow the specific moral standards of a particular religion.

Thus, the manifestations of the State, through any of the three branches, must respect the principle of secularism. However, the actions of the Evangelical Parliamentary Front in the Brazilian Legislative branch interfere with the progress of proposals, such as policies for AIDS prevention, same-sex marriage, criminalization of homophobia, opposition to the decriminalization of abortion, and against the so-called "instant divorce," among dozens of other bills. Religious groups work to delay the voting on proposals, remove them from the agenda, or reject those that would oppose their belief system, while also working together to approve bills of interest to

their segment, such as the *Estatuto do Nascituro* [Statute of the Unborn], which, among other measures, provides for the payment of a minimum wage to women who become pregnant as a result of rape (Vital & Lopes, 2012, p. 170).

Reproductive health is a topic marked by significant resistance and is implicated in the moral and religious control of women's sexuality and reproductive rights. This issue can only be better understood from the perspective of gender social relations, as women's sexual and reproductive rights are not exercised equally, specifically due to their condition as women. It is the condition of being a woman, in a patriarchal, sexist, and heteronormative society, that underscore the tensions between secularism and the constitutional defense of sexual and reproductive rights.

Nevertheless, Article 5, section VI, of the Brazilian Constitution of 1988, which guarantees freedom of conscience and belief, and the fact that no one can be deprived of rights based on religious belief or philosophical or political conviction (article 5, section VIII, Federal Constitution of 1988), provides sufficient barriers to the adoption of any religious confessions by the state and serves as an express limitation to parliamentary action, even if representing the desires of a religious majority. In other words, the constitution of a religious parliamentary majority cannot impose its moral and religious convictions on all citizens through the creation of laws. Typically, the "bancada religiosa parlamentar" [religious parliamentary front] does not openly advocate for the establishment of a religious State. Instead, it seeks to ensure that its influence is on a par with that of other interest groups and pressure groups, seeking the same level of strength and legitimacy in shaping State policies and decisions (Vital & Lopes, 2012, p. 4).

The Executive branch, also restricted in its actions by the Constitution and the laws, faces the same limitations imposed on legislative actions.

Mariano Lopez Alarcon (1996, p. 71-72) highlights that societies are religiously and ideologically diverse and that the State has become desacralized to act in a secular manner, so that religious beliefs and practices tend to detach from institutional structures. Therefore, the primary consequence of secularization is pluralism, which encompasses all areas (religious, ideological, political, ethical, scientific, cultural, etc.), becoming more than just a principle in the new reality of the modern world.

Continuing, the author (Alarcon, 1996) emphasizes that living in religious and ideological pluralism is an experience that requires the constant practice of tolerance and vigilance to prevent religious or ideological exclusivism from evolving into monistic or fundamentalist positions, which would be unconstitutional. This creates legal mechanisms to obstruct monism, including the prohibition of confessionalizing the State.

The Brazilian Federal Constitution of 1988, in article 5, section VI, establishes that freedom of conscience and belief is inviolable and guarantees the free exercise of religious practices, protecting places of worship and their liturgies. Article 5, section VIII, states that no one shall be deprived of rights due to religious belief or philosophical or political conviction.

When addressing the political and administrative organization of the State, the Constitution of 1988 prohibits the Union, the states, the Federal District, and municipalities from establishing religious cults or churches, subsidizing them, obstructing their functioning, or maintaining any relationships of dependence or alliance with them or their representatives. It clarifies that, according to the

law, public interest collaboration may occur (article 19, I, Federal Constitution of 1988).

The relationship between the state and religion in the Constitution is based on the recognition of a fundamental right to freedom of belief and conscience, as well as the freedom of philosophical or political conviction, meaning:

> [...] na liberdade de crença entra a *liberdade de escolha* da religião, a *liberdade de aderir* a qualquer seita religiosa, a *liberdade de não aderir à religião alguma*, assim como a *liberdade de descrença*, a *liberdade de ser ateu* e de exprimir o agnosticismo. Mas não compreende a liberdade de embaraçar o livre exercício de qualquer religião, de qualquer crença, pois aqui também a liberdade de alguém vai até onde não prejudique a liberdade dos outros (Silva, 2015, p. 242, emphasis by the author).

> [...] THE FREEDOM OF BELIEF INCLUDES THE FREEDOM TO CHOOSE A RELIGION, THE FREEDOM TO JOIN ANY RELIGIOUS SECT, THE FREEDOM NOT TO ADHERE TO ANY RELIGION, AS WELL AS THE FREEDOM TO DISBELIEVE, THE FREEDOM TO BE AN ATHEIST, AND TO EXPRESS AGNOSTICISM. HOWEVER, IT DOES NOT ENCOMPASS THE FREEDOM TO HINDER THE FREE EXERCISE OF ANY RELIGION OR BELIEF, AS ONE'S FREEDOM ALSO EXTENDS ONLY TO THE POINT WHERE IT DOES NOT INFRINGE UPON THE FREEDOM OF OTHERS.

In addition to respecting these freedoms that generate fundamental rights, the Constitution intended for the State itself to refrain from sponsoring any religion, meaning that it should be a secular state.

Religious freedom also encompasses three liberties: the freedom of belief, the freedom of worship, and the freedom of religious organization. Celso Ribeiro Bastos (1999, p. 190-191) establishes the same distinction and states that the freedom of conscience is not the same as the freedom of belief, as a free conscience can decide not to have any belief, meaning that atheists and agnostics are also protected, and freedom of conscience can also point to adherence to certain moral and spiritual values that do not follow any religious system.

Regarding the relationship between State and Church, José Afonso da Silva (2015, p. 243) observes the existence of three systems: confusion, union, and separation, each with its own variations.[23] In the "confusion" system, the State merges with a specific religion, which is characteristic of the theocratic state, such as the Vatican and Islamic states. In the case of "union," the State participates in a particular church's organization and functioning, such as its involvement in appointing religious ministers and their remuneration. This was the system in the Brazilian Empire. In the Empire's Political Constitution, the Roman Catholic Apostolic Religion was the official one, and the only permitted cult was Catholicism. Other religions were only tolerated as "domestic worship" in private homes, without being considered temples. The Emperor, before being crowned, had to swear to maintain the Catholic religion. It was the Executive Power's responsibility to appoint Bishops and provide ecclesiastical benefits. In other words, it was a confessional state.

Only with the Proclamation of the Republic and the Constitution of 1891 did Brazil become a secular state, allowing and respecting all religious vocations.

The "separation and collaboration" system is the one adopted by the Constitution of 1988. The separation aspect is more clearly defined, as the constitutional text states that the federated units cannot establish religious cults, create religions or sects, or subsidize

them with public funds, nor can they hinder the practice of religious worship by making it more difficult or restricted. This is where the immunity of places of worship from taxes or other public levies is included. Regarding separation, relationships of dependency or alliance with any cult, church, or its representatives are not allowed, which does not, of course, prevent diplomatic relations with confessional states in the context of International Law.

As for the "collaboration for public interest", article 19, section I of the Constitution can be understood as a provision with limited effectiveness, depending on the enactment of infraconstitutional legislation for full application.

A Technical Note from the Legislative Consultancy of the Chamber of Deputies guides all parliamentarians on this matter:

> [...] nos termos da Constituição Federal (art. 19, I), o Brasil adota o histórico princípio republicano da laicidade – princípio da separação entre Estado e Igreja, entre instituições governamentais e religiosas. Portanto, proposições ou outros trabalhos parlamentares de caráter religioso ferem esse princípio constitucional.
> [...]
> O princípio do Estado Laico e, portanto, típico das nações que vivem sob a égide do Estado Democrático de Direito. Só não é observado hoje nas teocracias, como as que existem em algumas nações, sobretudo do mundo islâmico, e em nações e sociedades tribais. E é sobejamente sabido o preço que se paga nos regimes teocráticos pela mistura das razões de Estado com as de crença e culto religioso. (Almeida Júnior, 2013, p. 3-4).

> [...] ACCORDING TO THE FEDERAL CONSTITUTION (ART. 19, I), BRAZIL ADOPTS THE HISTORIC REPUBLICAN PRINCIPLE OF SECULARISM – THE

> PRINCIPLE OF SEPARATION BETWEEN STATE AND CHURCH, BETWEEN GOVERNMENTAL AND RELIGIOUS INSTITUTIONS. THEREFORE, PARLIAMENTARY BILLS OR OTHER MOVES OF A RELIGIOUS NATURE VIOLATE THIS CONSTITUTIONAL PRINCIPLE.
>
> [...]
>
> THE PRINCIPLE OF A SECULAR STATE IS CHARACTERISTIC OF NATIONS THAT LIVE UNDER THE RULE OF LAW IN A DEMOCRATIC STATE. IT IS ONLY NOT OBSERVED TODAY IN THEOCRACIES, SUCH AS THOSE IN SOME ISLAMIC COUNTRIES, AND IN TRIBAL NATIONS AND SOCIETIES. THE PRICE PAID IN THEOCRATIC REGIMES FOR MIXING THE REASONS OF STATE WITH THOSE OF RELIGIOUS BELIEF AND WORSHIP IS WELL-KNOWN.

The Federal Constitution of 1988, by opting for a secular state, chose the regime of tolerance and respect for diversity. As Jorge Miranda (1993, p. 357) points out:

> [...] sem plena liberdade religiosa, em todas as suas dimensões – compatível, com diversos tipos de relações das confissões religiosas com o Estado – não há plena liberdade cultural, nem plena liberdade política. Assim como, em contrapartida, aí onde falta a liberdade política, a normal expansão da liberdade religiosa fica comprometida ou ameaçada.

> [...] WITHOUT COMPLETE RELIGIOUS FREEDOM, IN ALL ITS ASPECTS – IN ALIGNMENT WITH DIFFERENT TYPES OF RELATIONS BETWEEN RELIGIOUS DENOMINATIONS AND THE STATE – THERE IS NO TRUE CULTURAL OR POLITICAL FREEDOM. LIKEWISE, WHERE POLITICAL FREEDOM IS RESTRICTED, THE NATURAL DEVELOPMENT OF RELIGIOUS FREEDOM IS COMPROMISED OR THREATENED.COMPROMISED OR THREATENED.

The treatment of freedom of belief and conscience, as a fundamental constitutional right, is, therefore, key to ensuring sexual and reproductive rights. Without adopting any particular religious or moral conception in the debate, the State must guarantee all perspectives within the private sphere.

It is also important to note that the decriminalization of abortion will not force anyone to undergo the procedure, precisely because the State is secular, and it ensures the exercise of all moral and religious conceptions. What has been observed, however, is a certain appropriation of legal discourse by religious arguments:

> A narrativa religiosa do direito absoluto do concepto como sinônimo do direito à vida elude seu ponto de partida religioso, pois se traveste de narrativa jurídica e elide os princípios da narrativa jurídica baseados na ponderação entre distintos bens jurídicos. Busca produzir uma nova fundação do conceito de pessoa capaz de esquecer que a pessoa juridicamente tornada "sujeito de direitos" pressupõe o contexto do sujeito em relações sociais. Hierarquiza os supostos direitos das mulheres como subalternos aos aventados direitos do zigoto, da mórula, do embrião e do feto (a qualquer tempo de sua formação e em qualquer circunstância, de tal forma que se esvanecem não só os direitos das mulheres sobre sua reprodução, como seus direitos à vida, à saúde e à vida digna. Ao se apropriar da linguagem dos direitos humanos, a distorce em nome da sacralização de uma vida em abstrato, e não de uma pessoa social em concreto. (Machado, 2017, n.p.)

> The religious narrative of the absolute right of the conceptus as synonymous with the right to life eludes its religious starting point, as it cloaks itself in legal

> NARRATIVE AND BYPASSES THE PRINCIPLES OF LEGAL REASONING BASED ON THE WEIGHING OF DISTINCT LEGAL INTERESTS. IT SEEKS TO CREATE A NEW FOUNDATION FOR THE CONCEPT OF PERSONHOOD THAT FORGETS THAT THE LEGALLY RECOGNIZED "PERSON SUBJECT TO RIGHTS" PRESUPPOSES THE CONTEXT OF THE INDIVIDUAL WITHIN SOCIAL RELATIONS. IT HIERARCHIZES THE SUPPOSED RIGHTS OF WOMEN AS SUBORDINATE TO THE ASSERTED RIGHTS OF THE ZYGOTE, MORULA, EMBRYO, AND FETUS (AT ANY STAGE OF THEIR DEVELOPMENT AND UNDER ANY CIRCUMSTANCE), TO THE EXTENT THAT NOT ONLY ARE WOMEN'S RIGHTS TO REPRODUCTION OBSCURED, BUT ALSO THEIR RIGHTS TO LIFE, HEALTH, AND DIGNITY. BY APPROPRIATING THE LANGUAGE OF HUMAN RIGHTS, IT DISTORTS IT IN THE NAME OF THE SACRALIZATION OF AN ABSTRACT LIFE, RATHER THAN OF A CONCRETE SOCIAL PERSON.EALTH, AND DIGNITY. BY APPROPRIATING THE LANGUAGE OF HUMAN RIGHTS, IT DISTORTS IT IN THE NAME OF THE SACRALIZATION OF AN ABSTRACT LIFE, RATHER THAN OF A CONCRETE SOCIAL PERSON.

It is also worth highlighting that:

> Sociedades fortemente marcadas por uma tradição católica são conformadas por um imaginário social em que a maternidade não se coloca como uma escolha, mas como uma obrigação que se impõe duplamente, como uma realização e como uma "punição" para as mulheres, que, caso tenham relações sexuais fora do escopo do casamento, devem arcar sozinhas com o ônus dessa escolha
> [...]
> Embora diversas religiões condenem ostensivamente a prática do aborto, essa condenação deve ter lugar no âmbito de cada comunidade religiosa e não no espaço público da atuação estatal, forçosamente laico por mandamento constitucional.

É por isso que a argumentação religiosa que embasa a defesa da vida do feto a todo custo faz sentido no âmbito privado da vivência de cada crença, mas não pode ser imposta publicamente como regra moral à toda população, ainda que em um país de maioria católica. Isso significaria infringir o direito à liberdade religiosa daqueles que professam outras religiões ou mesmo nenhuma religião, impondo uma única perspectiva à toda sociedade e violando simultaneamente os direitos de laicidade na prestação de serviços públicos de saúde e de autonomia privada e liberdade religiosa de cada mulher. O campo jurídico – que também é da esfera pública -, também não pode utilizar o entendimento religioso sob pena de ferir a laicidade do Estado. (Gonçalves & Rosendo, 2015, p. 314–315).

Societies that are strongly influenced by a Catholic tradition are shaped by a social mindset according to which motherhood is not seen as a choice but as an obligation imposed in two ways: as a fulfillment and as a "punishment" for women who engage in sexual relations outside the bounds of marriage and are expected to bear the burden of that choice alone.

[...]

Although various religions openly condemn the practice of abortion, this condemnation must remain within the realm of each religious community and not extend into the public sphere of State action, which is constitutionally required to be secular. This is why religious arguments supporting the defense of fetal life at all costs may hold meaning within the private practice of individual faiths but cannot be publicly imposed as a moral rule on the entire population, even in a predominantly Catholic country. Doing

> SO WOULD INFRINGE UPON THE RELIGIOUS FREEDOM OF THOSE WHO ADHERE TO OTHER RELIGIONS OR NONE AT ALL, IMPOSING A SINGLE PERSPECTIVE ON SOCIETY AS A WHOLE AND SIMULTANEOUSLY VIOLATING THE PRINCIPLES OF SECULARISM IN PUBLIC HEALTH SERVICES, AS WELL AS THE PRIVATE AUTONOMY AND RELIGIOUS FREEDOM OF EACH WOMAN. THE LEGAL FIELD — ALSO PART OF THE PUBLIC DOMAIN — LIKEWISE CANNOT RELY ON RELIGIOUS UNDERSTANDING WITHOUT COMPROMISING THE SECULAR NATURE OF THE STATE.

The guarantee of a secular State is fundamentally important to interpret the prohibition of abortion in light of this principle, as well as to interpret the protection of the right to life and other fundamental constitutional rights of women as constitutional barriers to uphold the criminalization of abortion. As previously stated, decriminalization would allow each woman to make her moral choices consciously and responsibly, as abortion would not be a crime, motherhood would not be mandatory, and there would be no obligation to undergo an abortion, respecting each individual's beliefs and moral values. Neither religions nor any belief or philosophical conviction should impose themselves on others in disregard of human dignity, freedom, self-determination, reproductive health, and family planning rights.

Flávia Piovesan (2007, p. 67) points out secularism as a political argument for revising the criminalization of abortion, emphasizing that a secular State is essential for exercising human rights and fostering a free, diverse, and pluralistic society. She argues that there is no scientific consensus on when life begins — whether at fertilization, the embryo's implantation in the uterus, or only with extrauterine life, as Judaism suggests. Within Catholicism itself, St. Thomas Aquinas firmly maintained that the soul entered the fetus after a certain period — 40 days for males and 80 days for females.

For many years, under this doctrine, the Catholic Church considered abortion not a crime when performed early in pregnancy, before the fetus was thought to acquire a soul.

Similarly, Samantha Buglione (2013, p. 200) argues that the criminalization of voluntary abortion is rooted in a purely moral domain, which neither science nor ethics can dictate. The conflict arises from the different moral beliefs about life and from the freedom of belief guaranteed by the same legal framework that inadvertently fosters discrimination. Consequently, this situation violates fundamental principles of democratic order, such as freedom of belief, freedom of thought, and equality.

State secularism is a prerequisite for the realization of all constitutional rights involved in the abortion decriminalization debate. It is a necessary foundation to exercise these rights and for a secular understanding of the right to life. Moreover, it enables the proportional balancing of protecting the embryo's life according to its development while safeguarding the other constitutional rights of women, which will be examined in greater detail in the next chapter.

2.2 RIGHT TO LIFE: CONSTITUTIONAL PROTECTION INTEGRATED IN THE INTER AMERICAN CONVENTION OF HUMAN RIGHTS – PACT OF SAN JOSÉ, COSTA RICA

> *A fetus was found near a trash bin in a restricted area of the hospital. A few days earlier, there had been a theft of misoprostol from the hospital pharmacy. Several employees were questioned, but nothing was discovered. One employee who had missed work the following day presented a medical certificate stating that she was not pregnant during the police investigation.*

Lúcia went to the hospital with severe abdominal pain, unaware that she was pregnant. She felt the urge to defecate and went to the bathroom. She did not examine what came out of her body. Afterward, when she wiped, there was no blood. Later, hospital staff found a fetus of about 6 months in the toilet.

An 8-month-old fetus was found in a public restroom in the emergency department. No one could be identified as the person responsible.

When addressing the decriminalization of abortion, it is impossible not to discuss life. Abortion is criminalized under the Brazilian Penal Code with the supposed aim of protecting "life." Life is a fundamental constitutional right. As Roberto Dias (2012) has already stated when discussing the end of life, death, or dignified death as a constitutional right, this book does not seek to define life either:

> Esse estudo não tem, obviamente, a pretensão de definir a vida, mesmo porque ela parece indefinível, por contemplar uma gama de inumeráveis relações, alegrias, sofrimentos, reações, angústias, prazeres, etc. Por esses motivos, pode-se dizer que a vida é muito mais do que o ciclo que se inicia em um certo momento e termina com a morte, pois a vida não é precisa. Viver é *et cetera*. A vida deve ser compreendida em sua complexidade e, principalmente, em sua qualidade, e não como um intervalo de tempo ou apenas como um fenômeno biológico. (Dias, 2012, p. 117)

> This study obviously does not intend to define life, especially since it seems indefinable, encompassing an innumerable range of relationships, joys, sufferings, reactions, anxieties, pleasures, etc. For these reasons, it can

BE SAID THAT LIFE IS MUCH MORE THAN THE CYCLE THAT BEGINS AT A CERTAIN MOMENT AND ENDS WITH DEATH, AS LIFE IS NOT PRECISE. LIVING IS *ET CETERA*. LIFE MUST BE UNDERSTOOD IN ITS COMPLEXITY AND, MOST IMPORTANTLY, IN ITS QUALITY, NOT MERELY AS A SPAN OF TIME OR SIMPLY AS A BIOLOGICAL PHENOMENON.

The right to life, within the constitutional framework, is one of those rights known as classic rights. It was among the first rights included in the Declarations of Rights and Constitutions of modern constitutionalism. It is closely linked to the Liberal State model, and initially, it was interpreted as the guarantee of biological, physical, and organic life, requiring, for its protection, the non-intervention of the State, meaning that the State should not violate people's lives, kill them, or interfere with their ability to live.

After the socialist revolutions and the rise of the Social State, the right to life took on a new meaning, one that was social and collective. Therefore, the protection of the right to life now involves the guarantee of minimum conditions for a good life — one of quality, where health, education, housing, work, leisure, well-being, etc., are ensured. In short: human dignity. Thus, the mere abstention of the State is not enough to achieve these values; on the contrary, the State must consistently act to achieve these other rights related to the right to life through public policies.

The right to life, along with the rights to liberty, equality, security, and property, is part of the classic rights, the first ones to be constitutionalized, and all of them are outlined early in the section "Fundamental Rights and Guarantees" and are part of the head of Article 5 of the Federal Constitution of 1988.

Therefore, the right to life is part of the set of fundamental rights in its constitutional framework and is the subject of study for anyone

who delves into Constitutional Law or Human Rights. Thus, any constitutionalist should, at first, be concerned with defining its limits, interpreting its meaning and scope, and, in some way, addressing the issue of abortion, to which it is directly related. However, this is not exactly what happens in Brazilian Constitutional Law. Scholars of Constitutional Law rarely focus monographically on the subject, with few exceptions; very few books or manuals address the issue, and even fewer do so in any depth.[24].

In this context, it is worth mentioning the book of José Afonso da Silva (2015, p. 205, emphasis in the original) that seeks to address the subject:

> Houve três tendências no seio da Constituinte. Uma queria assegurar o direito à vida, *desde a concepção*, o que importava em proibir o aborto. Outra previa que a condição de sujeito de direito se adquiria pelo nascimento com vida, sendo que a vida intrauterina, inseparável do corpo que a concebesse ou a recebesse, é responsabilidade da mulher, o que possibilitava o aborto. A terceira entendia que a Constituição não deveria tomar partido na disputa, nem vedando, nem admitindo o aborto. Mas esta não saiu inteiramente vencedora porque a Constituição parece inadmitir o abortamento. Tudo vai depender da decisão sobre quando começa a vida. A nós, nos parece que, no feto, já existe vida humana. Demais, numa época em que há muitos recursos para evitar a gravidez, parece injustificável a interrupção da vida intrauterina que se não evitou. No fundo, a questão será decidida pela legislação ordinária, especialmente a penal, a que cabe definir a criminalização e descriminalização do aborto. E, por certo há casos em que a interrupção da gravidez tem inteira justificativa, como a necessidade de salvamento da vida da mãe, o de gravidez decorrente de cópula forçada e outros que a ciência médica aconselhar.

> There were three trends within the Constituent Assembly. One aimed to guarantee the right to life *from conception*, which would involve prohibiting abortion. Another argued that the condition of being a subject of rights was acquired by birth with life, with intrauterine life being inseparable from the body that conceived or received it, making it the woman's responsibility, which allowed for abortion. The third believed that the Constitution should not take sides in the dispute, neither prohibiting nor permitting abortion. However, this position was not entirely victorious because the constitution seems to reject abortion. Everything will depend on the decision regarding when life begins. To us, it seems that human life already exists in the fetus. moreover, in an era when there are many resources to prevent pregnancy, it seems unjustifiable to terminate intrauterine life that was not prevented. Ultimately, the issue will be decided by ordinary legislation, particularly penal law, which will define the criminalization and decriminalization of abortion. And certainly, there are cases where pregnancy termination is fully justified, such as in the need to save the mother's life, pregnancies resulting from forced intercourse, and others that medical science may advise.

Several authors, including those mentioned below, affirm that the Constitution guarantees the right to life from conception, or from the uterine phase, some of them, without providing further justification for their claims:

O direito à vida é o mais fundamental de todos os direitos, já que se constitui em pré-requisito à existência de todos os demais direitos.
O início da mais preciosa garantia individual deverá ser dado pelo biólogo, cabendo ao jurista, tão-somente dar-lhe o enquadramento legal, pois do ponto de vista biológico a vida se inicia com a fecundação do óvulo pelo espermatozoide, resultando um ovo ou zigoto. Assim a vida viável, portanto, começa com a nidação, quando se inicia a gravidez.
[...]
A Constituição, é importante ressaltar, protege a vida de forma geral, inclusive uterina. (Moraes, 2009, p. 35)

The right to life is the most fundamental of all rights, as it is a prerequisite for the existence of all other rights. The beginning of the most precious individual guarantee should be established by biologists, with legal experts merely providing its legal framework. From a biological perspective, life begins with the fertilization of the egg by the sperm, resulting in a zygote. Therefore, viable life begins with implantation, when pregnancy starts. [...] It is important to note that the constitution protects life in a general sense, including uterine life.

A Constituição assegurou o direito à vida. Em outras palavras, o texto constitucional proibiu a adoção de qualquer mecanismo que, em última análise, resulte na solução não espontânea do processo vital.
Ao lado desse aspecto, releva observar que outras formas de interrupção do processo vital estão igualmente proibidas pelo texto constitucional, dentre elas a eutanásia e o aborto.

[...]
É que a vida, iniciada, com a concepção, não pode sofrer solução de continuidade não espontânea, fazendo com que o direito a ela também se estenda ao nascituro. Logo, mesmo uma emenda constitucional não poderia legitimar o aborto em nosso sistema jurídico fora das hipóteses já admitidas, sabido que é o disposto no art. 60, parág. 4º, IV da Constituição da República, que petrificou os chamados direitos individuais. (Araújo & Nunes Júnior, 2015, p. 214).

The constitution ensures the right to life, which, in other words, means that it prohibits the adoption of any mechanism that would ultimately lead to the non-spontaneous termination of the vital process. In this context, it is important to highlight that other forms of interruption of the vital process, such as euthanasia and abortion, are also prohibited by the constitutional text. [...] Life, once begun with conception, cannot be prematurely interrupted by non-spontaneous means, extending the right to life to the unborn. Therefore, even a constitutional amendment could not legitimize abortion outside the exceptions already recognized, as stipulated in Article 60, Paragraph 4, IV of the Brazilian Constitution, which solidified the so called individual rights.

O elemento decisivo para se reconhecer e se proteger o direito à vida é a verificação de que existe vida humana desde a concepção, quer ela ocorra naturalmente, quer *in vitro*. O nascituro é um ser humano. Trata-se, indisputavelmente, de um ser vivo, distinto da mãe que o gerou, pertencente à espécie biológica do *homo sapiens*. Isso é bastante para que seja titular

do direito à vida – apanágio de todo ser que surge do fenômeno da fecundação humana.

O direito à vida não pressupõe mais do que pertencer à espécie *homo sapiens*. Acreditar que somente haveria pessoa no ser dotado de autoconsciência é reduzir o ser humano a uma propriedade do indivíduo da espécie humana, que inclusive pode ser perdida ao longo da sua existência. O indivíduo que se consubstancia da fusão de gametas humanos não é apenas potencialmente humano ou uma pessoa em potencial; é um ser humano, por pertencer a espécie humana. Por conta dessa sua espécie humana, o ainda não nascido tem direito à vida como os já nascidos, até por imposição do princípio da igual dignidade humana. (Mendes & Branco, 2015, p. 259).

The decisive element in recognizing and protecting the right to life is the fact that human life exists from conception, whether it occurs naturally or through in vitro fertilization. The unborn is a human being—a distinct life form, separate from the mother who carries it, belonging to the biological species *Homo Sapiens*. This fact alone is sufficient for it to be entitled to the right to life — an inherent right of any being that comes from the phenomenon of human fertilization.

The right to life does not require more than being a member of the *Homo Sapiens* species. To believe that a person only exists once an individual possesses self-consciousness is to reduce the human being to a mere property of the individual, which can even be lost throughout one's life. The individual created by the fusion of human gametes is not just potentially human or a person in potential; it is a human being, simply by belonging to the human species. Because of this, the

UNBORN HAS THE RIGHT TO LIFE AS MUCH AS THE BORN, DRIVEN BY THE PRINCIPLE OF EQUAL HUMAN DIGNITY.

> O direito à vida é o mais importante de todos os direitos. Sem a proteção incondicional do direito à vida, os fundamentos da República Federativa do Brasil não se realizam. Daí a Constituição proteger todas as formas de vida, inclusive a uterina.
> [...]
> O direito à vida inicia-se com a fecundação do óvulo pelo espermatozoide, resultando num ovo ou zigoto. (Bulos, 2008, p. 414-423)

> THE RIGHT TO LIFE IS THE MOST IMPORTANT OF ALL RIGHTS. WITHOUT THE UNCONDITIONAL PROTECTION OF THE RIGHT TO LIFE, THE FOUNDATIONS OF THE FEDERATIVE REPUBLIC OF BRAZIL ARE NOT REALIZED. HENCE, THE CONSTITUTION PROTECTS ALL FORMS OF LIFE, INCLUDING THE UTERINE ONE.
> [...]
> THE RIGHT TO LIFE BEGINS WITH THE FERTILIZATION OF THE EGG BY THE SPERM, RESULTING IN AN EGG OR ZYGOTE.

André Ramos Tavares (2012, p. 576) affirms that, regarding the initial moment of life protection, the theory of conception embraced by the Catholic Church has been adopted. This theory defends the existence of human life from the moment of conception and aligns with the current directive of Brazilian legal systems. It is worthy to note that such affirmation is not based on the original wording of the Constitution but rather on interpretations from the Child and Adolescent Statute, the Civil Code, and the American Convention on Human Rights (Pact of San José, Costa Rica).

Regarding the Pact, the author observes that while it generally protects life from conception, it allows for exceptions. These exceptions, however, must respect the principle of proportionality — minimally harming the right in question — and are particularly justified — the relativization — when other equally constitutional values, such as a woman's right to health, life, dignity and many others are at stake. In specific cases, these circumstances may justify deviating from the directive to protect life from conception.

Daniel Sarmento (2007, p. 6) delves deeply into this issue in his article published in the anthology *Nos limites da vida: aborto, clonagem humana e eutanásia sob a perspectiva dos direitos humanos* [The Limits of Life: abortion, human cloning, and euthanasia from the perspective of human rights.]. He highlights that constitutional courts worldwide increasingly recognize protection for the life of the unborn but with less intensity compared to the rights of those already born.

Maria Garcia has also extensively explored this subject through constitutional law since 1998, publishing articles in academic journals. She argues that life begins at conception and that the constitutional right to life is safeguarded from that point. While strongly opposing abortion, Garcia generally supports its decriminalization. She reasons that women who undergo abortions already endure consequences within their own bodies and need education and support to avoid recurrence, enabling them to make autonomous decisions about their lives without fear or unnecessary obstacles.

> Há três formas de assassinato legal, as três igualmente execráveis: a pena de morte, a guerra e o aborto.
> [...]
> Sem dúvida que, no momento em que o óvulo é fecundado existe vida humana, isto é, há possibilidade de existir um

ser humano. Se existe vida e pessoa - em potencial – deve ser protegida, contra tudo e contra todos, inclusive a mãe - ou melhor, no caso, a sua portadora.

[...]

Em conclusão, nos posicionamos contrariamente à legalização do aborto:

(1) no momento em que houve fecundação, existe vida, isto é, existe a possibilidade do ser humano: homem *in spem*;

(2) é fase indispensável para as fases seguintes, isto é, não haverá ser humano completo, apto a vir à luz, se não houver uma fase inicial de fecundação. Logo, não importa a especificação do momento em que existe vida humana;

(3) existindo vida, está protegida pela Constituição (art. 5.º, *caput*, da CF/1988 contra tudo e contra todos, inclusive sua portadora;

A proposta, entretanto, é de descriminalização do aborto. A mulher que aborta cumpre uma pena contra si mesma, no seu próprio corpo e necessita, efetivamente, de informação e proteção para não reincidir e decidir sobre o seu próprio caminho sem entraves e temores. (Garcia, 1998, pp. 1-2 and 8-9)

There are three forms of legal murder, all equally reprehensible: the death penalty, war, and abortion. [...] Undoubtedly, at the moment the egg is fertilized, human life exists; that is, there is the possibility of a human being coming into existence. If life and a person — in potential — exist, they must be protected against everything and everyone, including the mother — or rather, in this case, the bearer.

[...] In conclusion, we position ourselves against the legalization of abortion:

At the moment of fertilization, life exists, meaning there is the possibility of a human being (*homo in spem*).

> This is an indispensable phase for subsequent stages; that is, there will not be a complete human being, ready to be born, without an initial stage of fertilization. Therefore, specifying the exact moment when human life begins is unnecessary.
>
> Once life exists, it is protected by the constitution (Article 5, *Caput*, of the 1988 Federal Constitution) against all threats, including those posed by its bearer; however, the proposal is for the decriminalization of abortion. A woman who undergoes an abortion inflicts punishment on herself, on her own body, and she truly needs education and support to avoid recurrence and to decide her path without obstacles or fears.

Ten years later, in 2008, the author revisited the topic and maintained her previous stance, expressing support for the decriminalization of abortion while opposing its legalization. She also suggested Restorative Justice mechanisms as a means of addressing the issue:

> Certos pressupostos têm de ser colocados:
> (1) a Constituição erigiu a vida em bem jurídico;
> (2) juridicamente, a vida é um processo que se inicia com o óvulo fecundado e termina com a morte;
> (3) a compartimentalização desse processo cabe às ciências naturais, para fins didáticos, medicinais e outros, consentâneos às suas finalidades.
> [...]
> A proposta, entretanto, é de descriminalização do aborto. A mulher que aborta agride seu próprio corpo e necessita, antes de tudo, de informação e de proteção.
> (1) A educação em todos os níveis (sexual, emocional, social, política) se demonstra como a única possibilidade efetiva de

reverter o grave quadro que o assunto envolve, em nível de prevenção; planejamento familiar;
(2) legislação especifica e juízo especial, mediante penalidade educacional; medidas de segurança e apoio: trabalho, proteção à mulher e à criança pelos órgãos sociais/estatais de atendimento ao que constitui o fundamento da sociedade, a maternidade, a família.
A proposta orienta-se, portanto, para o aproveitamento desses pressupostos e medidas, nas infrações do direito à vida pelo aborto: vedado, porém não criminalizado, mediante lei específica, dirigida à condição feminina que, nessa condição, ficaria vinculada a um círculo restaurativo, de componentes interdisciplinares, durante tempo certo, seja como apoio e auxílio, em caráter preventivo ou, a posteriori, no mesmo sentido de atendimento às causas e não, apenas, aos efeitos dos atos praticados.
Atender-se-ia, por essa forma, à prevenção do aborto: e ainda quando ocorrido, em muitos casos, pelas medidas de apoio e esclarecimento, à restauração das vidas de muitas mulheres, hoje apenas consideradas criminosas no que têm, igualmente, de vítimas - de muitos e diferenciados algozes, mas sobretudo, de si mesmas. (Garcia, 2008b, pp. 3 e 7)

Certain assumptions must be established:
(1) The constitution has elevated life to the status of a legal interest;
(2) Legally, life is a process that begins with the fertilized egg and ends with death;
(3) The compartmentalization of this process is the domain of the natural sciences, for educational, medical, and other purposes consistent with their goals. The proposal, however, is for the decriminalization of abortion. A woman who undergoes an abortion harms

her own body and, above all, requires information and protection.

(1) Aducation at all levels (sexual, emotional, social, political) is shown to be the only effective way to reverse the grave situation surrounding the issue, focusing on prevention and family planning;

(2) Specific legislation and a specialized court, with educational penalties, security measures, and support: work, protection for women and children through social/state agencies aimed at safeguarding the foundation of society, motherhood and the family.

The proposal is, therefore, oriented towards utilizing these assumptions and measures in addressing violations of the right to life caused by abortion: prohibited but not criminalized, through specific legislation targeting the female condition. Women in this situation would be linked to a restorative circle with interdisciplinary components, for a defined period, providing support and assistance either preventively or retroactively, addressing the causes rather than just the effects of the acts committed.

This approach would serve to prevent abortion and, in many cases, even when it occurs, through supportive and informative measures, to restore the lives of many women who are currently only regarded as criminals but are equally victims—of various and distinct oppressors, and, above all, of themselves.

In a text published in 2008, regarding human embryos and the principle of human dignity — months before the publication on the inviolability of the right to life and abortion — Garcia develops the thesis that human life begins at fertilization. Although the

Constitution does not specify the beginning of life or when it should be protected, it establishes the principle of the dignity of the human person. This dignity cannot be separated or detached from the being itself; it must be present from the very beginning, from the first moment of human life:

> Torna-se decisivo que o conteúdo normativo da dignidade da pessoa humana, reconhecido e pronunciado pela Lei Fundamental, não seja restringido arbitrariamente, mas, pelo contrário, abranja os primeiros instantes da vida de todo homem, estendendo a proteção da dignidade a esta etapa do processo vital.
> Por ser o embrião humano também abrangido pela proteção de dignidade humana em sua fase de vida prematura e inicial, ele deve, pois, ser considerado e tratado como titular de dignidade humana e do direito à vida. (Garcia, 2008a, p. 5).

> It becomes crucial that the normative content of the dignity of the human person, as recognized and proclaimed by the Fundamental Law, is not arbitrarily restricted but, on the contrary, encompasses the earliest moments of every human being's life, extending the protection of dignity to this stage of the vital process.
> Since the human embryo is also covered by the protection of human dignity in its premature and initial stage of life, it must, therefore, be considered and treated as a bearer of human dignity and the right to life.

In the same vein, in a text published in 2010, Maria Garcia states that the Constitution of 1988, by establishing the inviolability of the right to life, does not distinguish between extrauterine or intrauterine life. By not making such a distinction, it encompasses

all forms of life. This guarantee of inviolability, therefore, involves a right to the existence of all human beings already conceived. In her most recent article on the subject, Garcia (2018, p. 1) reaffirms her position against the legalization of abortion, arguing that it is prohibited by the Federal Constitution of 1988, as it protects the inviolability of the right to life:

> Todo ser dotado de vida é indivíduo, isto é: "algo que não se pode dividir, sob pena de deixar de ser. O homem é um indivíduo, mas é mais que isto, é uma pessoa". E o art. 1º, III, da Constituição estabelece, como fundamento do Estado, "a dignidade da pessoa humana". A Convenção Interamericana de Direitos Humanos, OEA, 1969, expressa em seu art. 1º, 2: "Para os efeitos dos dispositivos desta Convenção, 'pessoa é todo ser humano'".

> Every living being is an individual, meaning "something that cannot be divided without ceasing to exist. a human being is an individual, but more than that, a person." Article 1, III, of the Constitution establishes "the dignity of the human person" as a foundational principle of the State. The American Convention on Human Rights, OAS, 1969, states in Article 1(2): "For the purposes of this Convention, 'person' means every human being".".

In general, we have seen that part of the authors in Brazilian Constitutional Law choose to assert — often without solid grounds — that the Federal Constitution of 1988 protects the inviolability of the right to life, and that this protection should be interpreted as encompassing life from conception. It is treated almost as a logical consequence that, since life exists at any stage of human development, it must always be protected equally at all times,

as if this were self-evident. There is rarely a deeper reflection or problematization regarding a subject that does not seem resolvable without thorough reasoning and substantiation. Moreover, the arguments provided by these authors do not usually address the conflict between the right to life of pregnant women and the human dignity of women in contrast to the right to life of the unborn from conception. Why should the latter prevail, and why should women be compelled to motherhood at the expense of their dignity, freedom, autonomy, health, etc.? This critical reflection is often absent and lacks the application of rational premises and proportionality in the context of restricting fundamental rights.

Under these circumstances, the perspectives of two authors stand out: Luigi Ferrajoli (2003) and Ronald Dworkin (2003), who delve deeply into the dilemmas involved in protecting the right to life of the unborn and the right to life and dignity of women.

Ferrajoli (2003) addresses the issue currently faced in Brazil following the filing of the claim of *Arguição de Descumprimento de Preceito Fundamental* [Noncompliance with Fundamental Precept] 442 (ADPF 442), which seeks to decriminalize abortion performed up to 12 weeks of pregnancy. His discussion explores the constitutional principle of the separation of powers and whether the decriminalization of abortion should be decided within the Legislative branch's jurisdiction, whether the Judiciary could also intervene, or whether the matter requires broader legal involvement:

> Em que medida e em que condições se justifica a intervenção do direito na solução dos problemas levantados pelas questões bioéticas, nomeadamente, pelas ligadas às intervenções científicas sobre o corpo humano? E quais são as fontes de direito mais apropriadas a esse fim: as leis, sob a forma de regras gerais e abstractas, ou antes – como de facto está a

> acontecer, nos países da *civil law* e também nos de *common law* – a intervenção dos juízes através de decisões motivadas, caso a caso, com base nos princípios? (Ferrajoli, 2003, p. 9).

> To what extent and under what conditions can the intervention of law be justified in addressing the issues raised by bioethical questions, particularly those related to scientific interventions in the human body? And what are the most appropriate sources of law for this purpose: legislation, in the form of general and abstract rules, or rather – as is indeed happening in civil law countries and also in common law jurisdictions – the intervention of judges through motivated, case-by-case decisions based on principles?f judges through motivated, case-by-case decisions based on principles?

The author considers abortion a moral issue and seeks to address the matter of the embryo between Law and Morality. He emphasizes that in this relationship, a position of confusion may arise, that is, a reciprocal implication between legal and moral issues. In this view, the presumed immorality of a certain behavior becomes a necessary condition and sufficient reason for its prohibition or punishment. If a behavior is immoral, it should also be prohibited by law. If it is a sin, it should also be treated as a crime.

Another position is one of opposition. Adopting this perspective, the Law is not, and should not be, an instrument to reinforce morality, given the existence of diverse moral conceptions within society. This is the premise of liberalism, moral pluralism, and cultural pluralism: *O direito tem o dever, diferente e mais limitado, de assegurar a paz e a convivência civil, impedindo os danos que as pessoas podem causar umas às outras, sem lhes impor sacrifícios inúteis ou*

insustentáveis [The law has the duty, different and more limited, to ensure peace and civil coexistence, preventing the harm that people can cause to one another, without imposing on them unnecessary or unsustainable sacrifices]. (Ferrajoli, 2003, p. 9).

Concluding his reflections on the relationship between law and morality, the author highlights:

> É nesta assimetria e nesta sua recíproca autonomia que se baseiam tanto o direito moderno como a ética moderna: por um lado, a moral laica fundada, em oposição, à heteronomia do direito, na autonomia da consciência individual, ou seja, na tese metaética da separação da moral do direito, em virtude da qual o juízo moral sobre um facto é independente da sua qualificação jurídica; por outro, a secularização do direito e a laicização do Estado baseadas na tese metajurídica da separação do direito da moral, em virtude da qual o direito positivo não somente é uma coisa diferente da moral, como nem sequer deve refletir uma determinada moral, proibindo um comportamento como crime só porque é considerado pecado. (Ferrajoli, 2003, p. 10).

> It is on this asymmetry and their reciprocal autonomy that both modern law and modern ethics are based: on one hand, secular morality, grounded—in opposition to the heteronomy of law—on the autonomy of individual conscience, that is, on the meta-ethical thesis of the separation of morality from law, according to which a moral judgment about a fact is independent of its legal classification; on the other hand, the secularization of law and the State, based on the meta-legal thesis of the separation of law from morality, according to which

POSITIVE LAW IS NOT ONLY DISTINCT FROM MORALITY BUT ALSO MUST NOT REFLECT A PARTICULAR MORALITY, PROHIBITING A BEHAVIOR AS A CRIME MERELY BECAUSE IT IS CONSIDERED A SIN.

Ronald Dworkin (2003, p. 8), in an in-depth study on the right to life and abortion, emphasizes that the reasons driving many opponents of the freedom to choose are too profound and visceral to be swayed by any kind of argumentation. However, he proposes that the arguments he raises could enable those who value freedom to reach a collective solution to the political controversy — one that could be accepted with dignity by all sides. The author believes it is possible to approach the moral controversy in a way that allows some to continue to believe, with full conviction, that abortion is morally wrong, while also believing, with equal fervor, that pregnant women should be free to make a different decision if their own convictions permit or require it.

The author (Dworkin, 2003, p. 12) identifies two main objections to abortion. The first, which he calls derivative, asserts that human life begins at conception and that the fetus is a person from that moment onward. As a person and a human being, it has its own rights and interests, including the right not to be killed.

The second objection, which he calls independent, has a distinctly different rhetoric. It argues, based on the sanctity of life, that life is sacred in itself, with intrinsic and innate value at any stage or form of human life. Abortion would be morally wrong not because it is condemnable or unjust to someone, but because it denies and profanes the sanctity or inviolability of human life. In other words, does the fetus have interests that should be protected by rights, including the right to life? Should the life of a fetus be treated as sacred, regardless of whether it has interests?

Regarding the first objection, Dworkin contends that it is very difficult to give any meaning to the idea that a fetus has its own interests, especially an interest in not being destroyed, from the moment of conception. However, from a certain stage of pregnancy—around the seventh month after conception—it becomes possible for the fetus to feel pain, and it could then have an interest in avoiding it. Dworkin (2003, p. 22) cites several embryological studies to this effect and argues that a safety margin should be set at around the twenty-sixth week of pregnancy. This period coincides with the current definition of viability, occurring relatively late in gestation[25].

Ferrajoli (2003, p. 10, emphasis by the author), addressing whether the fetus is a person and the implications for abortion, points out:

> O argumento principal das posições antiabortistas é, de facto, que o aborto é um homicídio, sendo o feto uma pessoa. Ora esta tese, como aliás a sua negação, só aparentemente é uma asserção. Habitualmente ela é sufragada pela observação, cada vez mais precisa e documentada, da vitalidade do embrião como forma de pessoa. Mas, a tese da vitalidade do embrião, empiricamente verdadeira, não equivale, nem permite deduzir a tese de que o embrião é uma pessoa. Podemos saber (e já sabemos) exactamente tudo sobre as características empíricas do embrião nas várias fases da gestação. Isto não impede que deduzir, por exemplo, a proibição do aborto da tese de que a vida precede o nascimento, é um *non sequitur*, ou seja uma conclusão ilegítima, porque corrompida por uma falácia naturalista. Uma dedução como esta pressupõe, de forma sub-reptícia, a tese moral da *qualidade de "pessoa"* do feto: que não é uma asserção, mas uma prescrição: não um juízo de facto, mas um juízo de valor, como tal, nem verdadeiro nem falso, antes submetido à avaliação moral e à liberdade de consciência de cada um.
> [...]

As teses que afirmam e as que negam que o embrião é uma pessoa não são nem verdadeiras nem falsas. O facto de a vida começar antes do nascimento, mesmo sendo sem dúvida verdadeiro, não é um argumento suficiente para estabelecer que o embrião ou o feto são pessoas, sendo *pessoa* um termo da linguagem *moral*.

[...]

Assim, na minha opinião, é justamente o princípio convencionalista e utilitarista da separação entre direito e moral que nos oferece a chave para a solução do problema. Para quem perfilha tais princípios há uma única convenção que torna compatível a tutela do feto, e em geral, do embrião como pessoa potencial, e a tutela da mulher que, precisamente porque é pessoa, não pode ser, de acordo com a segunda máxima da moral kantiana, tratada como um meio para fins alheios: a convenção segundo a qual o embrião é merecedor de tutela *se e só quando* pensado e desejado pela mãe como pessoa.

[...]

Na minha opinião, reside na tese moral de que a decisão sobre a natureza de "pessoa" do embrião deve ser remetida para a autonomia moral da mulher, em virtude da natureza justamente *moral* e não simplesmente biológica das condições em presença das quais ele é "pessoa".

The central argument of anti-abortion supporters is, in fact, that abortion constitutes homicide, as the fetus is considered a person. However, this thesis, as well as its denial, only superficially appears to be a factual assertion. It is often supported by increasingly precise and documented observations of the vitality of the embryo as a form of personhood. Yet, the thesis of the embryo's vitality, while empirically true, does

not equate to nor does it allow for the deduction of the claim that the embryo is a person. We may know (and already know) everything about the empirical characteristics of the embryo at various stages of gestation. This does not prevent the deduction, for instance, of the prohibition of abortion based on the premise that life precedes birth from being a *non sequitur*—an illegitimate conclusion corrupted by a naturalistic fallacy. Such a deduction implicitly presupposes the moral thesis of the fetus's status as a "person," which is not a factual assertion but rather a prescription: not a judgment of fact, but a value judgment, and as such, neither true nor false, but subject to moral evaluation and individual freedom of conscience.

[...]

The theses that affirm and those that deny that the embryo is a person are neither true nor false. the fact that life begins before birth, while undoubtedly true, is insufficient as an argument to establish that the embryo or fetus is a person, as the term "person" belongs to moral language.

[...]

thus, in my opinion, it is precisely the conventionalist and utilitarian principle of the separation between law and morality that offers the key to solving the problem. for those who adhere to such principles, there is only one convention that reconciles the protection of the fetus—or the embryo as a potential person—and the protection of the woman who, precisely because she is a person, cannot, according to the second maxim of Kantian morality, be treated as a means to the ends of others: the convention that the embryo is deserving

> of protection *only if and when* it is regarded and desired by the mother as a person.
>
> [...]
>
> In my view, the moral thesis that the decision regarding the nature of "personhood" of the embryo should be entrusted to the moral autonomy of the woman lies in the fact that the conditions under which the embryo is deemed a "person" are inherently *moral* and not merely biological.

According to the author, it is one thing to assert that life exists from conception until birth; it is another matter entirely to determine who or what qualifies as a person, which is not resolved on an empirical, scientifically verifiable level — an issue indeed. Since this determination is irresolvable empirically and instead belongs to the moral sphere, which allows for diverse and debatable solutions, it cannot be addressed by the law if one adheres to the secular and liberal principle of separating law and morality. This principle privileges a particular moral stance that considers the fetus as a person, and imposes it on everyone, thus forcing women who disagree to endure dramatic consequences. For those who support the separation of law and morality, to reconcile the protection of the fetus as a potential person with the protection of the woman — who is undeniably a person and cannot, as such, be treated merely as a means to someone else's ends — there exists a convention: the embryo is deserving of protection *only if and when* it is regarded and desired by the mother as a person.

When explaining the second objection, Dworkin (2003, p. 115) argues that the idea of the inviolability of each individual human life is rooted in two sacred foundations that combine and converge: natural creation and human creation. Thus, any human being,

including the most immature embryo, represents a triumph of divine or evolutionary creation that produces, as if out of nothing, a complex and rational being. It is equally a triumph of what we commonly refer to as the "miracle" of human reproduction, which ensures that each new human being is, simultaneously, distinct from the humans who created it and a continuation of them.

This sanctity of life would stem from these investments, both human and divine. However, it seems permissible to consider differentiated, gradual protection as the investment in this developing life increases over time. It would be more offensive to life to consider abortion in the later stages of pregnancy than at its beginning.

From the perspective of Brazilian constitutional dogmatics, it seems impossible to deviate from the provisions of the Federal Constitution of 1988, which establishes that the rights set forth therein do not exclude others deriving from the regime, constitutional principles, and international treaties to which Brazil is a party. There is an extensive debate regarding the incorporation and relationship of these human rights treaties with Brazil's domestic legal system. Nevertheless, Brazil is a party to the Inter-American Convention on Human Rights, which, in its Article 4.1, states that life must be protected from the moment of conception.

What is often overlooked in the heat of debates is the clause "in general": life must be protected from the moment of conception, in general. Thus, it would not be accurate to claim that the decriminalization of abortion in Brazil is prohibited by the aforementioned International Convention due to a strict protection of the right to life from conception. The "in general" clause is specifically included to allow for exceptions to the rule, enabling the protection of life from conception to be relativized and weighed. To interpret it otherwise would imply that countries within the

Inter-American System that permit abortion would face challenges in ratifying a treaty that provided absolute protection of life from conception[26].

The interpretation of the referred article by the Inter-American Court itself is different, acknowledging that permissive abortion legislation is compatible with the article of the Convention.

> [...] a Corte Interamericana de Direitos Humanos, nos termos do artigo 62 da Convenção Americana, [...] é o órgão jurisdicional com competência para realizar a última interpretação desse Pacto [...] e essa Corte, realizando a interpretação desse dispositivo convencional conforme o sentido corrente de seus termos e de acordo com a interpretação sistemática e histórica, evolutiva e mais favorável ao objeto e fim do tratado, no caso Artavia Murillo y Otros vs. Costa Rica, proclamou que "**o direito à vida, protegido, em geral, desde a concepção busca proteger os direitos da mulher grávida**", não os direitos do embrião e, consequentemente, não os direitos do feto. Além disso, também decidiu a Corte Interamericana, nessa mesma sentença, que "**o direito à vida desde a concepção não pode ser absoluto, mas, apenas, incremental e admite exceções**" e, ainda, que "**o direito à vida desde a concepção não pode ser usado para limitar outros direitos de maneira desproporcionada, nem pode gerar efeitos discriminatórios**". É por isso que a Comissão Interamericana de Direitos Humanos, com fundamento nessa jurisprudência, reconhecendo a necessidade de um juízo de ponderação entre os direitos fundamentais da mulher e os interesses relativos à proteção de uma vida em potencial, afirmou que a descriminalização do aborto "**não viola o direito à vida, ainda que protegido pela Convenção Americana, em geral, desde a concepção, nos termos de seu artigo 4º**". (Torres, 2018, no pagination, emphasis in the original)[27]

[...] the Inter-American Court of Human Rights, under Article 62 of the American Convention, [...] is the judicial body with the authority to provide the final interpretation of this Pact. [...] In interpreting this conventional provision in accordance with the ordinary meaning of its terms and following *systematic, historical, evolutionary, and most favorable interpretations to the object and purpose of the treaty, the Court, in the case of *Artavia Murillo et al. v. Costa Rica*, **declared that "the right to life, generally protected from conception, aims to safeguard the rights of the pregnant woman,"** not the rights of the embryo and, consequently, not the rights of the fetus. Furthermore, in the same judgment, the Inter-American Court also decided that **"the right to life from conception cannot be absolute but rather incremental and admits exceptions"** and that **"the right to life from conception cannot be used to disproportionately limit other rights or produce discriminatory effects."**

For this reason, the Inter-American Commission on Human Rights, based on this jurisprudence and recognizing the necessity of balancing fundamental rights of the woman with the interests related to the protection of potential life, affirmed that the decriminalization of abortion **"does not violate the right to life, even though it is generally protected by the American Convention from conception, as stated in Article 4."**

It is clear, not only from the way Article 4, I of the Convention was written but also from the interpretation the Court gave in a specific case, that the inviolability of the right to life, as provided in our Constitution, which includes protection from conception, is not absolute. The "in general" clause, added by the American Convention on Human Rights, confirms this thesis. In other words, this protection can be weighed, as it must be carried out "in general" while considering the protection of women's rights related to the issue of abortion[28].

Balancing the right to life from conception with the human rights of women, including their right to life, freedom, autonomy, health, reproductive health, and family planning, has been addressed since the 1970s by the Constitutional Courts of the United States and Germany. Being the oldest decisions on the matter, these cases are often cited and have even influenced other Constitutional Courts on the decriminalization of abortion[29].

The Roe v. Wade case, decided by the U.S. Supreme Court in 1973[30], is certainly the most famous. To this day, there are significant political efforts by groups and movements to review and overturn this precedent. In this case, it was determined that the right to privacy involved a woman's right to decide whether to continue her pregnancy. The Texas law that criminalized abortion, except to save the life of the pregnant woman, was declared unconstitutional. It was also understood that a range of harms could arise from the mandatory continuation of an unwanted pregnancy, including psychological damage, physical and mental health concerns, distress, and an unhappy life or future. The state could, for the protection of potential life, regulate factors governing the decision about abortion as the pregnancy progressed.

Thus, according to the decision, abortion would be permitted up to the first trimester of pregnancy by the woman's choice, advised by

her doctor. In the second trimester, abortion would continue to be allowed, but states could regulate the procedure to protect the health of the woman. Only from the third trimester, when extrauterine viability occurs, could states prohibit abortion to protect the potential life of the fetus, except when abortion was necessary to save the life or health of the woman (Sarmento, 2007, p. 8).

In Germany, in 1974, a law was enacted decriminalizing abortion performed by a doctor at the woman's request within the first 12 weeks of pregnancy. In 1975, the German Constitutional Court, in what became known as the "Abortion Case I," ruled that the fetus is already a developing being, endowed with dignity, and deserving of constitutional protection, which should begin with the implantation of the fertilized egg in the uterus. The woman's right to privacy on this issue should, in a balancing exercise, yield to the right to life of the fetus, except in cases to save the life or health of the woman, fetal malformation, dramatic social circumstances of the family, or pregnancy resulting from sexual violence. The permissive law was thus ruled unconstitutional (Sarmento, 2007, p. 13).

In 1993, the German Constitutional Court (Abortion Case II) reviewed the constitutionality of the law of 1992, which, after the reunification of Germany, adopted the 12 week timeframe for abortion with prior counseling but without establishing specific indications, prevailing the woman's decision in the whole country. The law of 1992 had passed because, in East Germany, abortion was allowed in the first trimester of pregnancy. The Court ruled that the law was unconstitutional but allowed abortion until 1995, as long as the woman was advised to preserve the developing life. This solution was adopted by the legislator in 1995 (Sabadell & Dimoulis, 2008, p. 333).

It is important to note the Court's effort to reconcile and balance the rights of women with some protection of the right to life of

the fetus, while explicitly stating that such protection does not necessarily have to be enforced through criminalization:

> O reconhecimento do direito à vida do feto não impõe necessariamente a punição do aborto. Quando a gestante decide realizar o aborto possui razões sérias para tanto e dificilmente será intimidada pela previsão de pena. Assim sendo, o direito penal não é imprescindível para proteger o feto. O Tribunal Constitucional considerou que o legislador infraconstitucional não possuía o dever de penalizar o aborto, podendo ele ponderar os interesses em questão e decidir se deveria ser feita (e em quais situações) uma tipificação penal da conduta para produzir efeitos de prevenção geral negativa (intimidação através da ameaça de pena). (Sabadell & Dimoulis,2008, p. 334)

> The recognition of the fetus's right to life does not necessarily impose the punishment of abortion. When the pregnant woman decides to undergo an abortion, she has serious reasons for doing so and is unlikely to be intimidated by the threat of punishment. Therefore, criminal law is not essential to protect the fetus. The Constitutional Court considered that the infraconstitutional legislator was not obligated to penalize abortion, and could instead weigh the interests at stake and decide whether, and under what circumstances, a criminal classification of the act should be established to produce effects of general deterrence (intimidation through the threat of punishment).

Finally, it is important to mention the judgment of ADI 3.510 in May 2008 by the Federal Supreme Court (STF), which questioned the

Biosafety Law (11.105/2005) that authorized research for therapeutic purposes with frozen embryonic stem cells discarded from assisted reproduction clinics. In the action, it was argued that human life begins at fertilization, and therefore the questioned law violated the inviolability of the right to life. Thus, the human embryo, even outside the uterus, would be considered human life protected by the 1988 Federal Constitution and the dignity of the human person. The STF understood that the Federal Constitution does not establish when life begins, nor does it treat each stage of human life as an autonomous legal asset. From a constitutional perspective, a person is protected once born. There is no embryonic human person, but an embryo of a human person, and it was concluded that there are possibilities to protect, in several ways, each stage of the biological development of the human being through infraconstitutional law. The pre-implantation embryo is an asset to be protected, but not a person in the biographical sense referred to by the Constitution. In this judgment, it was stated that an embryo is not a constitutionally protected person.

This possibility of weighted and differentiated protection of developing life offers the most reasonable and balanced interpretation between the rights of the pregnant woman and the protection of the embryo's life, as will be further explored in the next chapter.

2.2.1 Constitutional protection of the right to life: is there room for progression throughout the process and differentiated protection over time?

> *The mother called the police. She knew her daughter was pregnant and saw when she was feeling unwell and went to the bathroom. She didn't let her daughter flush the toilet. She was already taking*

care of a grandson who was about one and a half years old, whom the daughter had when she was 15. The daughter had told her she didn't want the pregnancy. She didn't let her flush the toilet and called the police because the daughter was committing a crime. The daughter said, "Thank God" when the abortion happened. The mother told her: "An animal protects its offspring, doesn't let anyone get close and this is what you do to the child?"

Bia took a chemical substance – not specified by her during the police inquiry. She bought the substance from a third party, whom she also didn't identify. At home, she felt abdominal pain and had heavy bleeding. The mother helped her and took her to Casa de Saúde Santa Marcelina, where she received medical treatment, but it was not possible to prevent the abortion. The mother brought the fetus, which she found in the bathroom toilet, male, weighing 810 grams. In her statement, Bia said she already had three children. She had a romantic encounter with her ex-husband and got pregnant. She was desperate, found a "mãe de santo" in the center who recommended a potion for which she paid 50 reais. She took the liquid for two days. On the second day, she had severe abdominal pain and was found by her mother in her bed, bleeding and was taken to the hospital. Her ex-husband was unaware of the pregnancy. She regrets it.

At first, one might think that the solution to the abortion issue, in light of what the Federal Constitution provides regarding the inviolability of the right to life, would be very simple, as it would only require an agreement on the beginning of life. Once the beginning of life is determined, if the Federal Constitution of 1988 establishes the inviolability of the right to life as a fundamental constitutional right, this protection would begin when life begins. If it is correct that life begins at the so-called "moment of conception," then the entire intrauterine life would be protected by the Constitution[31].

The Brazilian Federal Constitution of 1988 did not originally specify when life would be protected or inviolable. As seen in the previous chapter, many authors argue that intrauterine life would be protected by the Constitution by virtue of its protection of life, as the Constitution makes no distinction. They agree that life is a process, and the Constitution does not make distinctions of protection during this process. José Afonso da Silva (2015) argues that the infraconstitutional legislator could make such distinctions, with criminal law playing that role. André Ramos Tavares (2012) offers a similar view, suggesting that this is permitted by the wording of the Inter-American Convention, which protects life, in general, from conception.

Here, it is important to conduct a historical analysis of the protection of the right to life in the constitutions, in parallel with the criminalization of abortion in Brazil, since abortion was criminalized as early as the *Código Criminal do Império* (Imperial Criminal Code)[32], without any constitutional provision for the protection or inviolability of life. The constitutional protection of life only emerged from the Constitution of 1946. In theory, there was no constitutional reason for the criminalization of abortion between 1824 and 1946. Therefore, it is not possible to affirm that abortion was criminalized in Brazil based on a constitutional norm that guided the infraconstitutional legislator in this regard.

However, what happens starting in 1946, when the inviolability of the right to life is preserved? At that time, the Criminal Code of 1940 was in force, which remains in effect today, and it was not based on the inviolability of the right to life for the criminalization of abortion, since the Constitution of 1937 was in effect, and it did not contain such a provision. This disconnection, at the very least, destabilizes the frequent argument that abortion is criminalized due to the constitutional protection of the right to life in an inviolable manner.

The isolated analysis of the constitutional article protecting life may lead to the thesis that the current Criminal Code would be preserved by the Federal Constitution of 1946 that followed it, and by the later Federal Constitution of 1988, even though, with the wording of the American Convention on Human Rights, it would further limit the possibility of criminalization, following this argument.

However, Federal Constitution of 1988, by treating fundamental rights and guarantees so comprehensively and in detail, aiming to ensure equality between women and men, the right to health, and the right to family planning, opens up possibilities for new interpretations and calls into question the criminalization of abortion in Brazil. That is to say, still using constitutional theory, it becomes entirely possible to argue that the criminalization of abortion is not accepted under the Federal Constitution of 1988.

TABLE 1 – Normative Evolution of Abortion Criminalization in Brazil

PERIOD	LEGAL DOCUMENT	NORMATIVE PROVISION
1824 – 1891	POLITICAL CONSTITUTION OF THE EMPIRE OF Brazil OF 1824	General Provisions and Guarantees of Civil and Political Rights of Brazilian Citizens. Art. 179. The inviolability of the Civil and Political Rights of Brazilian Citizens, based on liberty, individual security, and property, is guaranteed by the Constitution of the Empire in the following manner:
1831 – 1890	CRIMINAL CODE OF THE EMPIRE (Law of December, 16 of 1830)	Article 199. To cause an abortion by any means employed, either internally or externally, with the consent of the woman involved. Penalties – imprisonment with labor for one to five years. If this crime is committed without the woman's consent, Penalties – doubled. [...] Article 200. To knowingly provide drugs or any means to cause an abortion, even if the abortion does not occur. Penalties – imprisonment with labor for two to six years. If this crime is committed by a doctor, pharmacist, surgeon, or practitioner of such arts, Penalties – doubled.

PERIOD	LEGAL DOCUMENT	NORMATIVE PROVISION
1890 – 1940	CRIMINAL CODE (Decree No 847, of 11, October of 1890)	Abortion Article 300. To provoke an abortion, whether or not the expulsion of the conceptus occurs: In the first case: Penalty of imprisonment for two to six years. In the second case: Penalty of imprisonment for six months to one year. § 1. If, as a result of the abortion, or the means used to provoke it, the woman's death follows: Penalty: imprisonment for six to twenty-four years. § 2. If the abortion is performed by a doctor or midwife legally authorized to practice medicine: Penalty: The same as previously established, and the loss of the right to practice the profession for a period equal to the duration of the sentence. Article 301. To provoke an abortion with the consent and agreement of the pregnant woman: Penalty: imprisonment for one to five years. Sole Paragraph. The pregnant woman who causes her own abortion voluntarily will incur the same penalty; with a reduction of one-third of the penalty if the crime was committed to conceal her own dishonor. Article 302. If a doctor or midwife, performing a legal or necessary abortion to save the pregnant woman from certain death, causes her death due to incompetence or negligence: Penalty: Cellular imprisonment for two months to two years, and deprivation of the right to practice the profession for a period equal to the sentence

PERIOD	LEGAL DOCUMENT	NORMATIVE PROVISION
1891 – 1934	CONSTITUTION OF THE REPUBLIC OF UNITED STATES OF Brazil OF 1891	**Declaration of Rights** Article 72. The Constitution guarantees to Brazilians and to foreigners residing in the country the inviolability of rights concerning liberty, individual security, and property in the following terms:
1937 – 1946	CONSTITUTION OF THE REPUBLIC OF UNITED STATES OF Brazil OF 1937	**Individual rights and guarantees** Art 122. The Constitution guarantees to Brazilians and foreigners residing in the country the right to liberty, individual security, and property, in the following terms
1940 – present	CRIMINAL CODE (Law No 2,848, of Dece,mber, 7 of 1940)	**CRIMES AGAINST THE PERSON** **CHAPTER I** **CRIMES AGAINST LIFE** Abortion induced by the pregnant woman or with her consent **Article 124** - Inducing abortion in oneself or consenting to someone else inducing it: **Penalty** - detention, from one to three years.
1946 – 1967	CONSTITUTION OF THE REPUBLIC OF UNITED STATES OF Brazil OF 1946	**Individual rights and guarantees** Art. 141. The Constitution guarantees to Brazilians and foreign residents in the country the inviolability of rights related to life, liberty, individual security, and property, as follows:
1967 – 1969	FEDERAL CONSTITUTION OF THE FEDERATIVE REPUBLIC OF Brazil 1967	DECLARATION OF RIGHTS **Individual rights and guarantees** Art 150 - The Constitution guarantees to Brazilians and to foreign residents in the country the inviolability of rights concerning life, liberty, security, and property, as follows:

PERIOD	LEGAL DOCUMENT	NORMATIVE PROVISION
1969 – 1988	CONSTITUTIONAL AMENDMENT No 01, OF 1969	DECLARATION OF RIGHTS **Individual rights and guarantees** Art 153 - The Constitution guarantees to Brazilians and to foreign residents in the country the inviolability of rights concerning life, liberty, security, and property, as follows:
1969 – present	AMERICAN CONVENTION ON HUMAN RIGHTS	**Article 4. Right to life** 1. Every person has the right to have their life respected. This right must be protected by law and, in general, from the moment of conception. No one may be deprived of life arbitrarily.
1988 – present	FEDERAL CONSTITUTION OF THE FEDERATIVE REPUBLIC OF Brazil 1988	FUNDAMENTAL RIGHTS AND GUARANTEES CHAPTER I **Individual and collective rights and obligations** Art. 5º All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

Source: made by the author

The issue, however, is not so easily resolved, since the Constitution does not explicitly state when life begins, nor is there scientific consensus on the matter. Suppose there were scientific unanimity regarding the beginning of life — would it be prohibited, under the current Constitution, to weight this protection throughout the development of life for someone who is not yet born? In other words,

is it merely a scientific, biological issue that should determine the legal treatment given? Once the beginning of life is established at a specific moment, would the Constitution be obligated to grant the same protection from that moment onward as it grants to a born human being?

This is not what is considered social consensus, starting with the Penal Code, which establishes a more severe penalty for the homicide of a human being already born, with a reduction for homicide committed right after birth (infanticide), and an even lesser penalty for abortion, committed before birth. Therefore, there is a progression of penalties that varies according to the stage of life: embryo/fetus, child, adult. It is accepted to weight in importance the different stages of human life.

Regarding the end of life, it is not very different. Dias (2012, p. 138) explains that the endpoint of this process has changed over time. In Antiquity, the final moment of death was marked by the cessation of heart activity. Starting in the Middle Ages, the end of life was determined by respiratory criteria. In the 20th century, with the advent of cardiopulmonary resuscitation techniques, artificial ventilation, intensive care, organ transplantation, etc., the new standard became the determination of brain death, which, once diagnosed, authorizes the post-mortem removal of tissues, organs, or body parts for transplantation or treatment, according to Law No. 9,434/1997.

It can be observed that the solution is, first and foremost, legal and politically chosen. Not that scientific criteria do not increasingly reveal each stage of life and death, and may be useful to lawmakers, judges, or administrators, but the decision of what, how much, and how to protect each of them is made by society as a whole through law, democratically established.

Judicial interpretations are found, as in decisions on habeas corpus, whose excerpts are transcribed below, that resolve the issue in the simplest way, as stated at the beginning:

> *"Habeas corpus"*. Paciente que responde a processo no qual lhe é imputada a prática do crime de aborto (artigo 124, do Código Penal). Pretensão ao trancamento da ação penal. 1. O crime de aborto tutela o bem jurídico vida. É a vida intrauterina (do nascituro), que está inserida no direito fundamental à vida a que alude a Constituição Federal (artigo 5º, *caput*). Trata-se de um bem jurídico que merece a tutela penal, no sentido de legitimar o Estado - através do devido processo legislativo a estabelecer a figura penal do aborto. (Habeas Corpus n.º 2188903-92.2017.8.26.0000, da Comarca de Ourinhos, Rel. Des. Laerte Marrone, j. 23/11/2017). (São Paulo, 2017a, s/p).

> Por proêmio, não se acolhe a arguição de inconstitucionalidade do artigo 124 do Código Penal. Com efeito, com a previsão desse crime tutela-se o bem jurídico referente à vida (do feto ou embrião), ao menos em princípio, direito fundamental assegurado pela Constituição da República (artigo 5º, caput). (Habeas Corpus n.º 2188893-48.2017.8.26.0000, da Comarca de Apiaí, Rel. Des. Encinas Manfré, j. 07/12/2017). (São Paulo, 2017b, s/p).

> 2. Constitucionalidade. Pese embora inúmeros países democráticos e desenvolvidos como Estados Unidos da América, Alemanha, Reino Unido, Canadá, França, Itália, Espanha, Portugal, Holanda e Austrália tenham entendido como inconstitucional a criminalização da interrupção da gestação durante o primeiro trimestre, continuo a me posicionar no sentido da constitucionalidade do crime previsto no art. 124, do Código Penal, haja vista que reconheço, sem qualquer

compromisso com o erro, a sacralidade e a inviolabilidade do direito à vida, intangível por natureza e corolário do princípio da dignidade da pessoa humana Isto porque, tendo em vista que, nas lições do hoje Ministro do Supremo Tribunal Federal, Alexandre de Moraes, a dignidade da pessoa humana é um valor espiritual e moral inerente à pessoa, que se manifesta singularmente na autodeterminação consciente e responsável da própria vida e que traz consigo a pretensão ao respeito por parte das demais pessoas, constituindo-se em um mínimo invulnerável que todo estatuto jurídico deve assegurar, somente pode ser limitada em casos excepcionais, tal como ocorre no caso de aborto praticado pela própria gestante (prevalece, no cotejo entre os princípios constitucionais, o direito à vida do nascituro).

Portanto, no caso em tela, parece-me que o **direito à vida**, intra ou extrauterina, tal como ocorre com o nascituro, **deve prevalecer** quando sopesado com qualquer outro direito fundamental da gestante ("direito sexual", "direito reprodutivo", "direito à autonomia da mulher" ou "direito à integridade física e psíquica da gestante"), sob pena, inclusive, do surgimento de práticas legalizadas de eugenia e de eutanásia. Em nenhuma hipótese haverá de prevalecer o entendimento de que o aborto seria um "direito reprodutivo fundamental", sob pena de completo esvaziamento do espectro jurídico do direito à vida!

O que me parece, no duro, é que não se poderia, **por meio de controle difuso de constitucionalidade**, reconhecer que até o terceiro mês de gestação seria possível a realização do aborto pela própria gestante, pois interpretar dessa maneira seria afirmar, ao menos para uma corrente mais extremista, que até o terceiro mês de gestação não haveria "vida" propriamente dita (afinal, se a morte se dá por meio da morte cerebral, "contrario sensu" a vida surge com o sistema nervoso central,

que ocorre a partir da 8ª semana e se completa na 20ª semana). (Habeas Corpus n.º 2188894-33.2017.8.26.0000, da Comarca de Hortolândia, rel. Des. Airton Vieira, j. 24/10/2017). (São Paulo, 2017c, author's emphasis, s/p).

Não se pode olvidar que o delito de aborto provocado pela gestante ou com o seu consentimento é fato típico, estando em plena vigência no ordenamento jurídico pátrio, que tem por escopo a tutela do direito fundamental à vida, no qual se inclui a vida intrauterina, insculpido no art. 5º, *caput*, da Constituição Federal, e previsto no capítulo relativo aos crimes contra a vida no Código Penal. Portanto, considerando que a norma guerreada não foi declarada inconstitucional pelo Supremo Tribunal Federal e se encontra em validade por faculdade do Poder Legislativo, a sua conformidade com os princípios constitucionais é presumida. (São Paulo, 2018a, s/p).

Por outro lado, é cediço que a Magna Carta proclama, como garantia fundamental e inviolável, o direito a vida, compreendida em tal proteção a intrauterina (CF, art. 5º), razão pela qual não comporta acolhimento a alegação de que norma penal incriminadora do artigo 124 do Código Penal não foi recepcionada pela Constituição Federal de 1988. Aliás, considerando que o bem jurídico tutelado no crime de aborto é a vida em formação (intrauterina), jamais poderia a paciente dispor livremente sobre a vida do nascituro, em que pese as suas prerrogativas constitucionais citadas na petição inicial.
Ademais, vale lembrar que, em algumas situações o Judiciário se depara com a necessidade de ponderar entre bens jurídicos tutelados pelo sistema, mas, no caso em apreço, se apresenta em primeiro lugar a proteção da vida em formação (intrauterina) sobre qualquer outro direito da paciente, salvo

se em decorrência da gravidez ela estivesse com a própria vida em risco. (São Paulo, 2017d, s/p).

Habeas Corpus – Aborto provocado pela gestante – Atipicidade por alegada não recepção do tipo penal do art. 124 do CP pela CF/88 – Princípio da dignidade da pessoa humana (art. 1º, III, da CF/88) que não se sobrepõe ao direito à vida (art. 5º, *caput,* da CF/88). Não se concebe a alegação de atipicidade da prática de autoaborto, sob o fundamento de que o tipo previsto no art. 124 do CP não teria sido recepcionado pela atual ordem constitucional, que possuiria como fundamento, entre outros, a dignidade da pessoa humana (art. 1º, III, da CF/88), do qual decorreriam a autodeterminação corporal como forma de exercício de autonomia individual de vontade da mulher e o seu poder de escolha acerca da maternidade, com direito potestativo ao aborto; a pretensão não se justifica igualmente sob o argumento de que a Constituição assegura aos cidadãos a inviolabilidade da intimidade e da vida privada (art. 5º, X, da CF/88), o planejamento familiar e intervenção estatal mínima (art. 226, § 7º, da CF/88), e a laicidade do Estado brasileiro (art. 5º, VI, da CF/88). Referidos direitos da mulher, conquanto realmente previstos no texto constitucional, efetivamente não se sobrepõem ao direito fundamental à vida do feto, que possui igualmente amparo constitucional (art. 5º, *caput*, da CF/88). (São Paulo, 2017e, s/p).

Habeas corpus. A petitioner undergoing prosecution for allegedly committing the crime of abortion (Article 124 of the Penal Code). Request to dismiss the criminal action.

1. The crime of abortion protects the legal interest of life. It is the intrauterine life (of the unborn) that

falls under the fundamental right to life mentioned in the Federal Constitution (Article 5, "caput"). This is a legal interest deserving of criminal protection, legitimizing the State—through the proper legislative process—to establish abortion as a criminal offense. (*Habeas Corpus No. 2188903-92.2017.8.26.0000, from the district of Ourinhos, Rapporteur Justice Laerte Marrone, judgment on 11/23/2017.*) (*São Paulo, 2017a, no page.*)

By way of preamble, the argument of unconstitutionality of Article 124 of the Penal Code is not upheld. Indeed, this crime provision safeguards the legal interest concerning life (of the fetus or embryo), which, at least in principle, is a fundamental right guaranteed by the Federal Constitution (Article 5, *caput*).(*Habeas Corpus No. 2188893-48.2017.8.26.0000, from the district of Apiaí, Rapporteur Justice Encinas Manfré, judgment on 12/07/2017.*) (*São Paulo, 2017b, no page.*)

2. Constitutionality. Although numerous democratic and developed countries such as the United States, Germany, the United Kingdom, Canada, France, Italy, Spain, Portugal, the Netherlands, and Australia have deemed the criminalization of abortion during the first trimester unconstitutional, I maintain my position that the crime defined in Article 124 of the Penal Code is constitutional, as I recognize—without any commitment to error—the sanctity and inviolability of the right to life, which is intangible by nature and a corollary of the principle of human dignity. This is because, as per the teachings of the current Supreme Federal Court Justice Alexandre de Moraes, human dignity is a spiritual and moral value inherent to the person. It manifests uniquely in the conscious and responsible self-determination of one's own life and entails a claim to respect from others, constituting

a minimum inviolable standard that every legal framework must ensure, which can only be limited in exceptional cases, such as abortion performed by the pregnant woman herself (where the constitutional principles balance in favor of the unborn's right to life). Hence, in the present case, it seems to me that the right to life, whether intrauterine or extrauterine, as with the unborn, should prevail when weighed against any other fundamental right of the pregnant woman ("sexual rights," "reproductive rights," "the right to autonomy," or "the right to physical and mental integrity"), under penalty of legitimizing legalized practices of eugenics and euthanasia. Under no circumstances should the view prevail that abortion is a "fundamental reproductive right," as this would completely empty the legal spectrum of the right to life! In essence, it seems implausible to argue, via diffuse constitutional control, that it would be permissible for a pregnant woman to perform an abortion until the third month of gestation, as such an interpretation would imply—for a more extreme view—that up to the third month of pregnancy, there is no "life" per se (since, if death is determined by brain death, then *contrario sensu,* life begins with the central nervous system, which starts developing from the 8th week and is completed by the 20th week). (*Habeas Corpus No. 2188894-33.2017.8.26.0000, from the district of Hortolândia, Rapporteur Justice Airton Vieira, judgment on 10/24/2017.*) (*São Paulo, 2017c, author's emphasis, no page.*)

It cannot be overlooked that the crime of abortion induced by the pregnant woman herself or with her consent is a typical offense, fully in effect within the Brazilian legal framework, whose purpose is to

protect the fundamental right to life, including intrauterine life, enshrined in Article 5, *caput*, of the Federal Constitution and provided for under the chapter concerning crimes against life in the Penal Code. Therefore, considering that the contested provision has not been declared unconstitutional by the Supreme Federal Court and remains valid by the authority of the Legislative Branch, its conformity with constitutional principles is presumed. (*São Paulo, 2018a, no page.*)

Furthermore, it is well established that the Constitution proclaims as a fundamental and inviolable guarantee the right to life, which includes intrauterine life (CF, Article 5), which is why the claim that the criminal provision of Article 124 of the Penal Code was not received by the 1988 Constitution cannot be accepted. Moreover, considering that the legal interest protected by the crime of abortion is life in formation (intrauterine), the petitioner could never freely dispose of the unborn's life, notwithstanding the constitutional prerogatives cited in the initial petition. Additionally, it is worth noting that, in some cases, the Judiciary faces the need to weigh conflicting legal interests protected by the system. However, in this case, the protection of life in formation (intrauterine) comes first over any other right of the petitioner, except where the pregnancy endangers the petitioner's own life. (*São Paulo, 2017d, no page.*)

Habeas Corpus – Abortion induced by the pregnant woman – Lack of typicality based on the alleged non-reception of Article 124 of the Penal Code by the 1988 Constitution – The principle of human dignity (Article 1, III, of the 1988 Constitution) does not supersede the right to life (Article 5, *caput*, of the 1988 Constitution).

> It is not conceivable to argue that the practice of self-induced abortion is atypical on the grounds that Article 124 of the Penal Code was not received by the current constitutional order, which is based, among others, on the principle of human dignity (Article 1, III, of the 1988 Constitution), from which derive bodily self-determination as an exercise of the woman's individual autonomy and her power of choice regarding motherhood, with an authoritative right to abortion. Such a claim is equally unjustifiable on the argument that the Constitution guarantees citizens the inviolability of privacy and private life (Article 5, X, of the 1988 Constitution), family planning, and minimal state intervention (Article 226, § 7, of the 1988 Constitution), as well as the secular nature of the Brazilian state (Article 5, VI, of the 1988 Constitution). These rights of the woman, while indeed provided for in the constitutional text, do not supersede the fundamental right to life of the fetus, which also has constitutional support (Article 5, *caput*, of the 1988 Constitution). (*São Paulo, 2017e, no page.*).

It is interesting to note that, in the ruling referenced in the first excerpt cited, the current wording of the Penal Code is defended, based on the interpretation of several criminal law scholars, as being compatible with the constitutional protection of intrauterine life:

> E é a vida o bem jurídico tutelado pelo menos o mais importante - pelo legislador na tipificação do crime de aborto (nas suas várias modalidades). Tanto que o delito está inserido, no Código Penal, no capítulo dos crimes contra a vida. Mais precisamente, protege-se a vida do ser humano em formação (ANIBAL BRUNO, Direito Penal, Parte Especial, tomo IV, Forense, 1966, pág. 160;

HELENO CLAÚDIO FRAGOSO, Lições de Direito Penal, Parte Especial, vol. I, Forense, 9ª edição, pág. 111; CEZAR ROBERTO BITENCOURT, Tratado de Direito Penal, Parte Especial, vol. 2, Saraiva, 6ª edição, pág. 128). Ou, em outras palavras, a vida do feto ou embrião (GUILHERME DE SOUZA NUCCI, Código Penal Comentado, Forense, 15ª edição, pág. 732), a preservação da vida humana intrauterina (FERNANDO CAPEZ, Curso de Direito Penal, Parte Especial, vol. 2, Saraiva, 7ª edição, pág. 111). Bem por isso, andou bem o legislador ao classificar o aborto como crime contra a vida (NÉLSON HUNGRIA, Comentários ao Código Penal, vol. V, Forense, 4ª edição, pág. 285). No mesmo sentido o escólio de LUIZ REGIS PRADO, ao discorrer sobre o bem jurídico agasalhado pelo crime de aborto: "O direito à vida, constitucionalmente assegurado (art. 5º, *caput,* CF), é inviolável, e todos, sem distinção, são seus titulares. Logo, é evidente que o conceito de vida, para que possa ser compreendido em sua plenitude, abarca não somente a vida humana independente, mas também a vida humana dependente (intrauterina)" (Curso de Direito Penal Brasileiro, volume 2, Parte Especial, RT, 8ª edição, p. 84, grifei). (Habeas Corpus nº 2188903-92.2017.8.26.0000, da Comarca de Ourinhos, Rel. Des. Laerte Marrone, j. 23/11/2017). (São Paulo, 2017a, s/p).

And it is life—at least the most important legal interest—that is protected by the legislator in the criminalization of abortion (in its various forms). This is evident from the fact that the offense is included in the Penal Code under the chapter on crimes against life. More specifically, it protects the life of a human being in formation (ANIBAL BRUNO, *Direito Penal, Parte Especial*, vol. IV, Forense, 1966, p. 160; HELENO CLAÚDIO FRAGOSO, *Lições de Direito Penal, Parte Especial*, vol. I, Forense, 9th edition, p.

111; CEZAR ROBERTO BITENCOURT, *Tratado de Direito Penal, Parte Especial*, vol. 2, Saraiva, 6th edition, p. 128).

In other words, it protects the life of the fetus or embryo (GUILHERME DE SOUZA NUCCI, *Código Penal Comentado*, Forense, 15th edition, p. 732), or the preservation of human intrauterine life (FERNANDO CAPEZ, *Curso de Direito Penal, Parte Especial*, vol. 2, Saraiva, 7th edition, p. 111). For this reason, the legislator acted appropriately by classifying abortion as a crime against life (NÉLSON HUNGRIA, *Comentários ao Código Penal*, vol. V, Forense, 4th edition, p. 285).

In the same vein, LUIZ REGIS PRADO explains the legal interest protected by the crime of abortion:

"The right to life, constitutionally guaranteed (art. 5, caput, CF), is inviolable, and all individuals, without distinction, are its holders. Therefore, it is evident that the concept of life, to be fully understood, encompasses not only independent human life but also dependent (intrauterine) human life."

(*Curso de Direito Penal Brasileiro, volume 2, Parte Especial*, RT, 8th edition, p. 84, emphasis added).

(*Habeas Corpus* nº 2188903-92.2017.8.26.0000, from the Comarca of Ourinhos, Rel. Des. Laerte Marrone, j. 23/11/2017). (*São Paulo, 2017a, s/p*).

It is entirely overlooked that this section of the Penal Code dates back to 1940. The Constitution in force at the time (1937) did not include the constitutional right to life, nor did the previous ones. Such a provision only appeared in the Constitution of 1946. Therefore, the 1940 legislator was not concerned with giving effect to or protecting a constitutional right to life that did not yet exist, much less intrauterine life:

As Constituições brasileiras e a inviolabilidade do direito à vida.
1824, art. 179: "A inviolabilidade dos Direitos Civis, e Políticos dos Cidadãos Brazileiros, que tem por base a liberdade, a segurança individual e a propriedade, é garantida pela Constituição do Império, pela maneira seguinte." Seguem-se os incs. I a XXXV, nenhum deles expresso sobre a inviolabilidade do direito à vida.
1891, art. 72: "A Constituição assegura a Brazileiros e a estrangeiros, residentes no paiz a inviolabilidade dos direitos concernentes à liberdade, à segurança individual e à propriedade nos termos seguintes:"
O art. 72 apresenta 31 parágrafos, nenhum alusivo à inviolabilidade do direito à vida.
1934, art. 113: "A Constituição assegura a brasileiros e a estrangeiros residentes no paiz a inviolabilidade dos direitos concernentes à liberdade, à subsistência, à segurança individual e à propriedade, nos termos seguintes:" Seguem-se os dispositivos de números 1 a 38, omissos sobre a inviolabilidade do direito à vida, notando-se no *caput,* a novidade do termo subsistência, novamente referido no n.º 34, alusivo ao direito ao trabalho.
1937, art. 122: "A Constituição assegura aos brasileiros e estrangeiros residentes no país o direito à liberdade, à segurança individual e à propriedade, nos termos seguintes:" O artigo contém dispositivo de números 1 a 17, nada referindo sobre o direito à vida.
Destacamos a expressão direito à vida, pela primeira vez expresso no Texto Constitucional, seguindo-se a Constituição de 1967, art. 150; Emenda Constitucional n. 1, de 1969, art. 153 e o atual art. 5.º, da CF/1988. (Garcia, 1998, p. 2).

Brazilian Constitutions and the Inviolability of the Right to Life

1824, Article 179: "The inviolability of Brazilian citizens' civil and political rights, which are based on freedom, individual security, and property, is guaranteed by the Constitution of the Empire in the following manner." This is followed by sections I to XXXV, none of which explicitly address the inviolability of the right to life.
1891, Article 72: "The Constitution guarantees Brazilians and foreigners residing in the country the inviolability of rights concerning freedom, individual security, and property, as follows:" Article 72 contains 31 paragraphs, none of which refer to the inviolability of the right to life.
1934, Article 113: "The Constitution guarantees Brazilians and foreigners residing in the country the inviolability of rights concerning freedom, subsistence, individual security, and property, as follows:" The provisions numbered 1 to 38 are silent on the inviolability of the right to life. Notably, the term subsistence appears for the first time in the preamble and is later referenced in section 34, related to the right to work.
1937, Article 122: "The Constitution guarantees Brazilians and foreigners residing in the country the right to freedom, individual security, and property, as follows:" The article includes provisions numbered 1 to 17, without any mention of the right to life.
The term right to life was explicitly included for the first time in the constitutional text in the Constitution of 1967, Article 150, and later in the Constitutional Amendment No. 1 of 1969, Article 153, and is currently enshrined in Article 5 of the Constitution of 1988.

The argument of protecting the right to life from conception is used, assuming that the exceptions currently provided in the Penal

Code are in accordance with the 1988 Federal Constitution and the Inter-American Convention on Human Rights. However, this reasoning is insufficient to justify rejecting the decriminalization of abortion in a broader range of cases, such as those currently proposed and under discussion in ADPF 442.

When addressing the protection of human life through Criminal Law, Roxin (2002) considers it unquestionable that the embryo is a preliminary and still underdeveloped form of human life, which cannot enjoy the same level of protection as a person who has been born. He states that a relatively large fundamentalist current, including in Germany, rejects this position, but he deems such a stance unsustainable. As an example, he notes that in Germany, intentionally preventing implantation is not punishable, meaning that before uterine implantation, the embryo lacks any legal protection. Even after implantation, German law permits abortion under relatively broad conditions. Regarding Brazil, he argues that *Face ao Código Penal brasileiro, que não toma posição expressa a respeito do momento inicial da proteção penal, é igualmente possível sustentar esse posicionamento, o que é mesmo feito por um setor aparentemente minoritário da doutrina* [In light of the Brazilian Penal Code, which does not take an explicit position regarding the initial moment of criminal protection, it is also possible to support this stance, which is indeed held by an apparently minority sector of doctrine] (Roxin, 2002, p. 2).

Roxin (2002, p. 3), based on the premise that the life of a person who has been born is the highest value in the legal system, also acknowledges that it is not possible to deny any protection to life in formation. For this reason, most modern legal systems adopt one of two solutions, which he calls the "indications model" and the "term model." According to the indications model, abortion is, in principle,

punishable. However, it is justified and not punishable if performed by a doctor under specific indications. According to the term model —generally within three months — pregnancy can be terminated at the mother's request, without requiring reasons to be stated.

The author explains that current German legislation combines these two approaches and can be described as a counseling model. Abortion performed within the first 12 weeks at the pregnant woman's request is not punishable, provided that she undergoes counseling at least three days before the procedure. The law stipulates that this counseling must aim to protect unborn life by encouraging the woman to continue the pregnancy and offering her prospects for a life with the child. This is because the termination of pregnancy within the first three months, even after counseling, remains unlawful according to the German Constitutional Court. In cases of medical or social indications, abortion may occur until the end of the pregnancy[33].

Roxin (2002, p. 5) advocates for a highly generous indications model, considering it theoretically preferable because it clearly acknowledges that abortion involves a conflict and requires a balancing of interests, in which the vital interests of the pregnant woman take precedence over those of the embryo:

> A proteção à vida em formação fica desconsiderada de modo bastante unilateral, se a interrupção da gravidez nos primeiros três meses permanecer impune, mesmo que ausente qualquer motivo razoável, que ela decorre do puro arbítrio ou comodidade, de modo que o aconselhamento pareça uma mera formalidade. A insistência do Tribunal Constitucional alemão no sentido da antijuridicidade de um tal aborto pode melhorar a proteção à vida do embrião no mundo dos conceitos jurídicos, mas não na realidade social.

> The protection of life in formation is disregarded in a highly unilateral manner if the termination of pregnancy within the first three months remains unpunishable, even in the absence of any reasonable justification, and is instead based purely on arbitrary choice or convenience, rendering counseling a mere formality. the german Constitutional Court's insistence on the unlawfulness of such abortion may enhance the protection of the embryo's life within the realm of legal concepts but does not achieve the same effect in social reality.

When addressing feminist narratives in the debate over abortion, with fundamentalist opposition in the Brazilian political scene, Machado (2017) highlights the prominence of the idea of the "living life" of women against the fundamentalist concept of an "abstract life", which serves only to completely delegitimize women's rights to terminate a pregnancy under any circumstances. The notions of "living life", "person in life", and "concrete life" emphasize the possibility and necessity of gradual protection of life to avoid completely disregarding the lives of women — born beings and holders of constitutional rights — which may conflict with an alleged need for absolute protection of the embryo's life.

It is a situation that clearly requires balancing and proportionality:

> Fortalecem a defesa do respeito à ética da justiça e do uso da "ponderação" por acesso a direitos em disputa que se opõem, mas que devem ser levados em conta relacionalmente: os direitos do concepto "à vida (abstrata)" e os direitos das mulheres advindos de sua "vida vivida". A ponderação, ainda que nem sempre esteja formulada nesta terminologia jurídica, está desde

> há muito presente nas propostas feministas de legalização do aborto ao período das doze primeiras semanas de gravidez e à necessidade de apresentação de razões e riscos graves (à saúde, à vida e à violência sexual). (Machado, 2017, n/p).

> They strengthen the defense of respecting the ethics of justice and the use of "balancing" in accessing rights in dispute, which oppose each other but must be considered relationally: the rights of the conceptus "to life (abstract)" and the rights of women arising from their "lived life." Balancing, even though it is not always framed in this legal terminology, has long been present in feminist proposals for the legalization of abortion within the first twelve weeks of pregnancy, as well as the need to present reasons and severe risks (to health, life, and sexual violence).

Thus, it is entirely possible to resolve the issue of the decriminalization of abortion while protecting the life of the embryo; however, not in an absolute way and without any weighting other rights involved in this matter, inc luding the right to life of the pregnant woman who does not wish to continue with an unwanted pregnancy. There are several rights, constitutional ones, that must be taken into account:

> O entendimento que vem prevalecendo nas decisões dos Tribunais Constitucionais de todo o mundo é o de que a vida do nascituro é protegida pela Constituição, embora não com a mesma intensidade com que se tutela o direito à vida das pessoas humanas já nascidas. E por razões de ordem biológica, social e moral, tem-se considerado também que o grau de proteção

> constitucional conferido à vida intra-uterina vai aumentando na medida em que se avança o período de gestação.
> Assim, sob o prisma jurídico, o caso parece envolver uma típica hipótese de ponderação de valores constitucionais, em que se deve buscar um ponto de equilíbrio, no qual o sacrifício a cada um dos bens jurídicos envolvidos seja o menor possível, e que atente tanto para as implicações éticas do problema a ser equacionado, como para os resultados pragmáticos das soluções alvitradas. (Sarmento, 2007, p. 6).

> THE UNDERSTANDING THAT HAS PREVAILED IN THE DECISIONS OF CONSTITUTIONAL COURTS WORLDWIDE IS THAT THE LIFE OF THE UNBORN IS PROTECTED BY THE CONSTITUTION, ALTHOUGH NOT WITH THE SAME INTENSITY AS THE RIGHT TO LIFE OF ALREADY BORN HUMAN BEINGS. AND FOR BIOLOGICAL, SOCIAL, AND MORAL REASONS, IT HAS ALSO BEEN CONSIDERED THAT THE DEGREE OF CONSTITUTIONAL PROTECTION GRANTED TO INTRAUTERINE LIFE INCREASES AS THE GESTATION PERIOD ADVANCES.
> THUS, FROM A LEGAL PERSPECTIVE, THE CASE SEEMS TO INVOLVE A TYPICAL SITUATION OF WEIGHING CONSTITUTIONAL VALUES, WHERE A BALANCE MUST BE SOUGHT, IN WHICH THE SACRIFICE OF EACH OF THE LEGAL INTERESTS INVOLVED IS MINIMIZED, AND WHICH CONSIDERS BOTH THE ETHICAL IMPLICATIONS OF THE PROBLEM TO BE ADDRESSED AND THE PRAGMATIC OUTCOMES OF THE PROPOSED SOLUTIONS.

Daniel Sarmento (2007, p. 29) appropriately argues the thesis that intrauterine human life is also protected by the Constitution, but with much less intensity than the life of someone already born. Moreover, he asserts that life is not protected uniformly throughout the gestation period, it comprehends different levels of protection

as it develops. The protection increases progressively as the embryo develops, becoming a fetus and later acquiring extrauterine viability.

Silvia Pimentel (2007, p. 161) accurately highlights the greater emphasis placed on the life of the fetus:

> Hoje, a proibição moral e legal à interrupção da gravidez não desejada pela mulher não encontra motivos razoáveis ou racionais, de ordem pública, que a justifiquem, ao contrário, ela representa um verdadeiro tabu, pois não é racional nem razoável valorizar mais a vida do feto – vida humana em formação – do que a vida da mulher – ser humano pleno. Representa tácita sub-valorização da mulher.

> TODAY, THE MORAL AND LEGAL PROHIBITION AGAINST THE INTERRUPTION OF AN UNWANTED PREGNANCY BY A WOMAN LACKS REASONABLE OR RATIONAL JUSTIFICATIONS OF PUBLIC ORDER. ON THE CONTRARY, IT REPRESENTS A TRUE TABOO, AS IT IS NEITHER RATIONAL NOR REASONABLE TO VALUE THE LIFE OF THE FETUS – A HUMAN LIFE IN FORMATION – MORE THAN THE LIFE OF THE WOMAN – A FULLY REALIZED HUMAN BEING. IT TACITLY REPRESENTS AN UNDERVALUATION OF THE WOMAN. IT TACITLY REPRESENTS AN UNDERVALUATION OF THE WOMAN.

From all that has been presented, it is argued that a balance should be established between the life of the fetus/embryo and the life of the woman, so that neither is completely denied by the other. This balance would be achieved through gradual protection, according to the development of the pregnancy, allowing abortion in the early stages and making it more difficult in the later stages. The Constitution guarantees the right to life of both the fetus and the woman, who, during pregnancy, by virtue of her status as a human being endowed

with dignity, enjoys a range of constitutional rights that must also be considered in the valuation process. These constitutional rights of women cannot be ignored, as they are full human beings.

Therefore, this is not a claim for an absolute right of a woman to her own body, as the need for gradual protection of the fetus is recognized, with greater restrictions on the possibility of abortion as the pregnancy advances. Abortion could only be allowed in the later stages of pregnancy to save the life of the woman or if there is a serious risk to her health. But what constitutional rights are those that require balancing and, for a certain period of pregnancy, relativize the right to life of the fetus? This will be examined in the next sections.

2.3 INTERLACED CONSTITUTIONAL RIGHTS THAT GROUND THE DUTY OF DECRIMINALIZATION IN BRAZIL

> *Lígia already had four children. She had a new romantic encounter and got pregnant. Since she didn't want to have another child, she bought the drug Cytotec from a third, unidentified person. She ingested one pill and felt severe abdominal pain. She was taken to Tatuapé hospital. The fetus was expelled at the hospital and fell to the ground from a height of one meter. It was checked by doctors but died. The police were called to the hospital. In a statement, the father and mother said that the baby fell headfirst to the ground when the daughter was climbing onto the hospital stretcher. Bia also stated in her testimony to the police that she had been waiting for more than two years for a tubal ligation surgery. She was 25 weeks pregnant. In court, Bia denied having*

taken any medication and said she had experienced eclampsia in previous pregnancies. She claimed that the nurses and the doctor forced her to say she had taken the drug, but she denied it. She said she would never do that because she knew it was a crime. She had another child after the events, as the trial took three years. She was acquitted due to lack of evidence.

To enrich the debate, it is crucial to address key constitutional rights that are intricately linked to discussions on abortion and the protection of the right to life. These rights have been interpreted in various ways: at times, as extensions of the constitutional right to life, emphasizing the notion of a dignified life (human dignity) and expanding the concept beyond mere biological existence or physical integrity to encompass health, mental and physical well-being, and the broader context of social rights. At other times, these rights are viewed as fundamental constitutional protections for pregnant women, potentially conflicting with or standing in opposition to the embryo's or fetus's right to life.

It is argued here that prioritizing an absolute right to life for the fetus at the expense of the woman's right to life and other fundamental constitutional rights, such as human dignity, liberty, self-determination, difference, privacy, and intimacy, is neither reasonable nor proportional. Moreover, criminalization based on the absolute right to life of the fetus has not promoted the protection it seeks.

It is necessary to examine these fundamental rights that are connected to the abortion discussion and to the necessary relativization of the right to life of the fetus, as will be seen below.

2.3.1 Human dignity, the right to liberty, self-determination, difference, privacy, and intimacy

> *The police received a report via the Military Police Operations Center (Copom) that a fetus had been found inside a trash bag by nurse Andreia, who tried to assist the baby, but it was already dead. Sandra, a janitor at the hospital, said that she went to the bathroom because she needed to urinate, and the baby came out. She cleaned the area and placed the baby in the trash bag. She was escorted to another hospital for a curettage procedure.*
>
> *In her statement at the police station, Sueli said she was planning to seek an abortion clinic, but she couldn't afford it and took Cytotec. She had no help from anyone to carry out the abortion. She has two children and had a previous miscarriage. The abortion happened at her home, and she disposed of the fetus in the building's trash bin. On her way back, she fainted and only woke up in the hospital. Her friend and a neighbor helped her, but they knew nothing about the situation.*

The principle of human dignity was established in the Federal Constitution of 1988 as a fundamental principle, so that the intention was not only to protect life but also life with dignity. Human dignity is essential for the proper handling of boundary issues, such as the one involving abortion, as Ingo Sarlet (2007, p. 212) points out. The author argues that dignity is an intrinsic quality of the human person, constituting the element that qualifies the human being as such, an inalienable principle of the very human condition. As Luís Roberto Barroso (2014, p. 9) points out, it is one of the greatest examples of ethical consensus in the Western world, mentioned in international documents, treaties, constitutions, legislation, and court decisions.

Sometimes, it is used inadequately to justify what would not be supported by other arguments or theories, due to a lack of rationality and a certain voluntarism in decisions. However, this is certainly not the case with the abortion debate, which is directly related to the right to life and dignified life, as well as various other fundamental constitutional rights. Therefore, I agree with Barroso (2014, p. 11) when he asserts that human dignity is a valuable concept with increasing importance in constitutional interpretation and can play a central role in grounding morally complex issues. He defines its core elements as consisting of three components: the intrinsic value of each human being, individual autonomy, and community value.

In this book, this liberal perspective is expanded to a more socially-oriented approach, consistent with the Social Democratic State outlined in the Federal Constitution of 1988. Human dignity, from a social perspective, involves the realization of social rights such as health, food, work, housing, education, leisure, culture, and many others. To ensure the human dignity of women, their health, especially reproductive health, and their freedom to exercise family planning, which involves positive obligations on the part of the State, must be guaranteed.

In the context of this book, the human dignity of women in relation to the abortion debate is considered one of the key elements that must be taken into account when considering the decriminalization[34] of abortion. In this regard, Barroso's (2014, p. 100) study is highly relevant, as he applies the concept of human dignity to structure the legal reasoning in the abortion case, classified as one of the difficult issues. Based on the elements that make up human dignity, the author exercises the application of each one to the abortion debate. In this way, with regard to the "intrinsic value," Barroso (2014) highlights that it involves conflicts between fundamental rights. On

one hand, the anti-abortion position, which argues that life begins at conception, claims that abortion is a violation of the fetus's right to life. On the other hand, continuing an unwanted pregnancy often implies physical and psychological harm to the woman and the inability to control her own body, as well as a violation of equality, because only women bear the full burden of pregnancy, and the right to abortion would place them in a position of equality with men. Therefore, in terms of human dignity as an intrinsic value, there would be a fundamental right favoring the anti-abortion position (right to life), countered by two fundamental rights favoring the woman's choice: physical and psychological integrity and equality.

Regarding the element of "autonomy," Barroso (2014) argues that it is important to reflect on the role of self-determination in the abortion context. It is the ability to decide for oneself, and individuals should be free to make decisions and take personal choices about their own lives. This involves privacy (as decided in Roe vs. Wade), which is the principle that requires public tolerance for autonomous and self-referential choices. Here, if the right to autonomy of the fetus (even though it has no consciousness) were recognized and its will prevailed, it would totally annul the autonomy of the mother, a formed being, who would be instrumentalized by the "will" of another. In other words, if the woman were forced to carry the fetus, she would become a means to satisfy another's will and would not be treated as an end in herself.

Finally, regarding the community value, it would be necessary to determine whether autonomy can be restricted in the name of shared values or state-imposed interests through legal norms. The author (Barroso, 2014) states that abortion represents a point of great moral disagreement in contemporary society, and in such circumstances, the proper role of the State is not to take sides and impose one

view, but to allow individuals to make autonomous choices, even if important and respectable religious groups oppose it, because the State should act based on public reasons. With respect to shared values within the social group, it is possible to observe significant dissent on this issue, with numerous countries allowing abortion and many others broadly disapproving of it.

Daniel Sarmento (2016, p. 310) observes that when interpreting and applying human dignity by state authorities, the principle of state secularism must be respected, and public reasons must guide the interpretation, meaning reasons independent of particular religious or metaphysical understandings that may be accepted by people of various beliefs.

The criminalization of abortion may signify a violation of the constitutionally established right to freedom. A person's right over themselves, the right to voluntary motherhood as the woman's self-determination over her own body, is a fundamental human right:

> *O direito sobre si mesmo*, sobre a própria pessoa e sobre o próprio futuro expresso pela clássica máxima de John Stuart Mill: "sobre si próprio, sobre a sua mente e sobre seu corpo, o indivíduo é soberano".
>
> Não se trata apenas do primeiro e mais importante dos direitos fundamentais. Trata-se também do primeiro e fundamental princípio da ética laica contemporânea: aquele já referido com base no qual nenhuma pessoa pode ser tratada como uma coisa, pelo que qualquer decisão heterônoma, justificada por interesses alheios aos da mulher, equivale a uma lesão do imperativo kantiano, segundo o qual nenhuma pessoa pode ser tratada como meio quer mesmo de procriação – para fins a si alheios, mas apenas como *fim* de si mesma. Por isso falamos de autodeterminação da mulher a propósito da maternidade.

Por isso, a decisão da maternidade reflecte um direito fundamental exclusivo das mulheres, porque, pelo menos sob esse aspecto, a diferença sexual justifica um direito desigual. O direito à maternidade voluntária, como autodeterminação da mulher sobre o seu próprio corpo, pertence-lhe em exclusivo, porque em matéria de gestação os homens não são iguais as mulheres, e só desvalorizando as mulheres como pessoas e reduzindo-as a instrumentos de procriação se pode limitar-lhes a soberania sobre o seu próprio corpo, submetendo-a ao controlo penal. Não se pode, portanto, configurar um "direito à paternidade voluntária" análogo e simétrico ao "direito à maternidade voluntária": porque gestação e parto dizem respeito unicamente ao corpo das mulheres, e não ao dos homens. (Ferrajoli, 2003, p. 13, emphasis in the original).

The right over oneself, over one's own person, and over one's own future is expressed by the classic maxim of John Stuart Mill: "Over oneself, over one's own mind and over one's own body, the individual is sovereign."

This is not just the first and most important of fundamental rights. It is also the first and fundamental principle of contemporary secular ethics: the principle already mentioned, according to which no person can be treated as a thing. Therefore, any heteronomous decision justified by interests other than those of the woman equates to a violation of the Kantian imperative, according to which no person can be treated merely as a means, not even for procreation purposes – for ends external to herself, but only as an end in herself.

This is why we speak of a woman's self-determination in matters of motherhood. Thus, the decision regarding motherhood reflects a fundamental right exclusive to

> women because, at least in this regard, sexual difference justifies an unequal right. The right to voluntary motherhood, as the woman's self-determination over her own body, belongs exclusively to her. This is because, in matters of gestation, men are not equal to women, and only by devaluing women as persons and reducing them to instruments of procreation can their sovereignty over their own bodies be limited, subjecting it to penal control. Therefore, one cannot establish an analogous or symmetrical "right to voluntary fatherhood" to the "right to voluntary motherhood," because gestation and childbirth concern only the bodies of women, not of men

In the opposite sense, Garcia (1998, p. 9) argues that the protection of the fetus's right to life would justify alienating the pregnant woman from her own body, equating her to the legal figure of a *depositário fiel* [35](a custodian of someone else's property):

> (4) como depositária a mulher, enquanto durar essa condição, não é "dona" do próprio corpo, investido este em receptáculo de outro ser, o que somente cessará com o nascimento - e, com este, a liberação é retomada da plena propriedade do próprio corpo;
> (5) fiel depositária - na acepção civil, portanto responsável pela vida do ser então existente. (Garcia, 1998, p. 9).

> (4) As a custodian, the woman, while in this condition, is not the "owner" of her own body, which is invested as a receptacle for another being, a situation that will only cease with birth – and with this, the full ownership of her body is restored.
> (5) As a custodian – in the civil sense, therefore responsible for the life of the existing being.

Ferrajoli (2003, p. 85) notes that this negative freedom complements the positive freedom of the right-power to generate, to bring people into the world, which is a constituent power, of a pre - or meta-juridical type, as it reflects a natural power inherent in a difference that is exclusively feminine. It is not only a right of freedom but also a right-claim, to which public obligations must correspond, concretely requiring assistance and care, both at the time of maternity and at the time of abortion. Therefore, it cannot be constituted as "a right to voluntary paternity" simply because pregnancy and childbirth do not belong to the male identity, but only to the female.

Amartya Sen (2000, p. 220), when analyzing the condition of women as agents of social change, emphasizes that aspects concerning the condition of agents are finally beginning to receive some attention, in contrast to the previously exclusive focus on aspects of well-being. Not long ago, the tasks in which these movements were primarily engaged involved the effort to obtain better treatment for women — a fairer treatment. The focus was mainly on the well-being of women — which was very necessary. However, the goals, starting from this "welfarist" approach, gradually evolved and expanded to incorporate — and emphasize — *the active role of women as agents*. Women are no longer passive recipients of aid to improve their well-being; they are increasingly seen, both by men and by themselves, as active agents of change: dynamic promoters of social transformations that can alter the lives of both women and men.

The author shows that this condition of women as agents has a significant impact on the exercise of fertility and reproductive choices:

> [...] há uma estreita relação entre o *bem-estar* feminino e a *condição de agente* das mulheres na produção de uma mudança no padrão de fecundidade. Assim, não surpreende

que reduções nas taxas de natalidade tenham com freqüência decorrido da melhora do *status* e do poder das mulheres. (Sen, 2000, p. 230, *author's emphasis*)

[...] there is a close relationship between women's well-being and their condition as agents in producing a change in fertility patterns. Thus, it is not surprising that reductions in birth rates have often resulted from improvements in women's status and power

Nesse contexto, os estudos sobre o aborto situam-se entre dois polos teóricos: por um lado, a autonomia reprodutiva da mulher, por outro lado, a necessidade (ou não) de proteção da vida humana (ou da expectativa de vida) durante o período da gestação, sabendo que a tutela do embrião ou do feto em relação a um possível aborto consentido pela gestante se dá de maneira duplamente heterônoma: primeiro, porque o Estado assume a iniciativa de tutelar essa forma de vida e, segundo, porque essa decisão se impõe a gestante contra sua vontade. (Sabadell & Dimoulis, 2008, p. 326)

In this context, studies on abortion are situated between two theoretical poles: on one hand, the reproductive autonomy of women, and on the other hand, the need (or not) to protect human life (or the expectation of life) during the gestational period, knowing that the protection of the embryo or fetus in relation to a possible abortion consented by the pregnant woman is doubly heteronomous: first, because the State takes the initiative to protect this form of life, and second, because this decision is imposed on the woman against her will.

This right to freedom, autonomy, and self-determination must not be understood in an abstract way, as if women, as individuals, did not have specificities that the law must be able to recognize. This freedom must be acknowledged within a legal system capable of embracing differences.

In general, differences have not been configured as a right: a "right to difference", but rather have been recognized as part of the "realm of being", the concrete and visible reality, because differences can and have been used to create inequality, discrimination, and prevent people from receiving the same legal recognition. This issue was relegated, and the pursuit of equality triumphed.

At the beginning of the history of the constitutional rights construction and the ones contained in international human rights treaties, differences were something to be eliminated so that everyone would have equal dignity and respect. That is, it was necessary that the existing differences were not obstacles to achieving equality as a legal norm or even a principle to be followed and attained. The human being, protected and subject to rights, was universalized and made "equal in rights" to all others[36].

In a later moment, after the first critique of the formulation of equality, which resulted in the conception of material equality, the women's movement and, above all, feminist thought, as well as other movements advocating for identities, made a new critique of equality, calling for "differences" to be incorporated into it. These differences should not be made invisible in the pursuit of equality but should be embraced and valued, once again redefining the conception of equality.

When analyzing the theme of equality and difference, Luigi Ferrajoli (1999, p. 73-76) points out that there are four possible models for the legal configuration of differences:

a. Legal indifference to differences – In this model, the minimal character of the law prevails, resembling a state of nature, of wild freedom. In this case, differences are neither valued, nor protected, nor repressed, nor violated. They are simply ignored. In this model, the fate of differences is entrusted to the relations of power, and the difference of sex results in the factual subjugation of women to the power of men and their confinement to the "natural" domestic role of woman and mother;

b. Legal differentiation of differences – In this model, some identities are valued while others are devalued. There is a hierarchy of identities, which are determined by valued differences (such as sex, birth, ethnicity, faith, language, etc.). Some are assumed as privileged statuses, sources of rights and powers, while others are assumed as discriminatory statuses, sources of exclusion and subjugation. This is the discriminatory paradigm of hierarchical systems of caste and class, typical of the more archaic phases of legal experience and dominant in pre-modern legal systems. However, it is also the paradigm that persists in the origins of modernity, when equality and the resulting universal rights were conceived and proclaimed in the first liberal constitutions, exclusively for white, property-owning men, reaching the extreme of coexisting, until the 20th century, with the discrimination of women in matters of political and civil rights. In this model, differences, starting with sex, are conceptualized and sanctioned as inequalities, privileges, and discriminations;

c. Legal confirmation of differences – In this model, there is an abstract affirmation of equality through homologation, neutralization, and general integration. Feminine difference is not legally discriminated against because it is unrecognized,

hidden, or masked. In some aspects, this model is both the opposite and analogous to the previous one. It is opposite because it does not aim to crystallize differences into inequalities but rather to annul them. However, it is analogous due to the shared devaluation of differences and the assumption of one identity as both "normal" and "normative".;

d. Equal legal valuation of differences – This model is based on the normative principle of equality, fundamental rights, and a system of guarantees that ensures their effectiveness. It does not leave differences to the dominance of the strongest, but instead makes them the subject of fundamental rights, which protect the most vulnerable. Instead of being indifferent or merely tolerant toward differences, as in the first model, it ensures their free affirmation and development for all. It differs from the second model by neither privileging nor discriminating against any difference but instead recognizing all as equally valuable. It diverges from the third model by not ignoring differences. Equality in fundamental rights is configured as the equal right of all to affirm and safeguard their own identity, in recognition of the equal value attributed to all differences, which make every person unique while also affirming that every individual is a person like all others.

It is understood that the criminalization of abortion aligns with the second model, where there is a legal differentiation of differences. From a biological difference (reproductive capacity), a supposedly neutral discriminatory factor is established to criminalize women. In this context, the reproductive capacity difference is treated and sanctioned as inequality, as discrimination.

The term opposing "difference" is not "equality" but "inequality". It is necessary to create guarantees for difference so that it effectively ensures equality. Equality remains a legal utopia that will continue to be violated as long as social, economic, and cultural reasons persist, consistently supporting male dominance (Ferrajoli, 1999, p. 92).

Vásquez (2009, p. 60) emphasizes that the obligation to guarantee rights without discrimination cannot be a neutral guarantee based on a standard citizen. It is essential to consider heterogeneous conditions; otherwise, indirect discrimination occurs. Vásquez further notes that, in recent years, there has been a trend to abandon the formal neutrality of criminal definitions, making way for criminal typifications that explicitly include sexual difference—a phenomenon some authors have referred to as the sexualization of punitive responses.

In addressing abortion, the feminist movement seeks to highlight the difference that must be acknowledged concerning gestation and maternity, which are linked to a specific sexed body, that of women. Pierucci (1999, p. 124-125, emphasis in the original) describes this progression:

> As feministas falam muito – e têm muito a dizer – sobre a diferença. Não foi sempre assim. A (re) descoberta da diferença feminina pela "segunda onda" do feminismo veio para se tornar o traço mais marcante e característico daquele renascer do movimento feminista em fins dos 60, início dos 80. Linda Gordon lembra que as feministas da "primeira onda" não usavam a palavra *diferença* (Gordon, 1991), empenhadas que estavam em transformar o sexismo, o discurso *misógino* convencional sobre a diferença entre os sexos, num discurso *andrógino* (cf. Elshtain, 1981; Badinter, 1986a; 1986b) e, dessa forma, conquistar para as mulheres oportunidades, postos e direitos iguais aos homens. A *igualdade* entre os sexos em termos legais, civis, políticos, sociais e até mesmo comportamentais

foi, por décadas a fio, quase um século, a grande reivindicação do feminismo da "primeira onda". As feministas eram todas imperturbavelmente igualitaristas. Hegemonia total do igualitarismo abolicionista da marginalização da mulher. Isso, até os entornos de 1968, o ano da grande rebelião cultural. A "segunda onda" representou para o feminismo um verdadeiro (re) nascimento teórico. Foi nessa travessia, quando acadêmicas feministas fundavam a "história das mulheres" que os círculos intelectuais aprenderam a falar em *diferença de gênero* (Oakley, 1972; Rubin, 1975; Scott, 1988b; Harding, 1993; Nicholson, 1994). "Sexo" passou a ser diferenciado de "gênero", seguindo-se a partir daí um importante e frutífero esforço de fundamentação teórica da grande descoberta: *a distinção sexo/gênero.*

O feminismo da "segunda onda" é diferencialista. A "diferença" pensada primeiro através da *diferença de gênero,* passando primeiro por ela. Que outra diferença, afinal, poderia ser mais importante do ponto de vista das feministas naqueles idos não tão remotos, situados "em algum momento entre a metade e o final da década de 70" (Scott, 1992:64)? A avidez com que muitas intelectuais acolheram a demanda por explorar teórica e documentalmente a "diferença" na chave da "diferença de gênero" levaram à criação da figura de uma *womanhood* abstrata por oposição à velha humanidade pensada pelas "grandes narrativas" ocidentais enquanto *manhood* = humanidade-virilidade. Uma *womanhood* portanto contrastiva emergindo num imaginário feminista que na época andava empolgado por um incontido e sincero desejo de unidade com um confortável senso de parentesco, como (se fosse) uma *sisterhood,* uma "irmandade de mulheres"

Retomando sinteticamente a história da produção teórica feminista, eis a *sinopse do enredo*: (1) da igualdade acima das diferenças passa-se à diferença de gênero; (2) da diferença de gênero, que representa a diferença feminina no singular em

relação ao mundo masculino também no singular, (3) chega-se a uma nova descoberta empírica, a das diferenças "entre as mulheres", as diferenças "dentro".

Feminists talk a lot—and have much to say—about difference. But it was not always so. The (re)discovery of feminine difference by the "second wave" of feminism emerged as the defining and most characteristic feature of the feminist movement's revival in the late 1960s and early 1980s. Linda Gordon points out that feminists of the "first wave" did not use the term *difference* (Gordon, 1991), as their efforts were focused on transforming sexism—the conventional misogynistic discourse on the differences between the sexes—into an androgynous discourse (cf. Elshtain, 1981; Badinter, 1986a; 1986b). Their aim was to secure for women equal opportunities, positions, and rights as men.

For decades, nearly a century, the equality of sexes in legal, civil, political, social, and even behavioral terms was the primary demand of "first-wave" feminism. Feminists were steadfastly egalitarian, with the total hegemony of abolitionist egalitarianism regarding the marginalization of women. This was the case until around 1968, the year of the great cultural rebellion.

The "second wave" marked a theoretical (re)birth for feminism. During this transition, as feminist academics founded "women's history," intellectual circles began to speak of gender difference (Oakley, 1972; Rubin, 1975; Scott, 1988b; Harding, 1993; Nicholson, 1994). "Sex" came to be differentiated from "gender," initiating a significant and fruitful theoretical effort to substantiate the great discovery: the sex/gender distinction

> The feminism of the "second wave" is differentialist. "Difference" was initially conceptualized through the lens of gender difference, as it was the most pertinent distinction from the feminists' perspective during those not-so-distant times, "sometime between the mid and late 1970s" (Scott, 1992:64). The eagerness with which many intellectuals embraced the demand to theoretically and documentally explore "difference" through the framework of "gender difference" led to the creation of an abstract notion of womanhood in contrast to the traditional concept of humanity as framed by Western "grand narratives," equating manhood with humanity-virility.
>
> Thus, a contrastive womanhood emerged in a feminist imaginary that was, at the time, fueled by an unrestrained and genuine desire for unity and a comforting sense of kinship, as if it were a *sisterhood*, a "sisterhood of women." In summarizing the history of feminist theoretical production, the plotline unfolds as follows: (1) from equality above differences, the focus shifts to gender difference; (2) from gender difference—which represents singular feminine difference in relation to the singular masculine world; (3) a new empirical discovery emerges: the differences among women, the differences *within*.

Can differences in fact also justify differences in law? Ferrajoli (1999, p. 84) observes that, in feminist debates, three rights have emerged as being specifically related to women: female freedom, the inviolability of a woman's body, and self-determination regarding abortion. According to the author, it seems that the first two are not exclusively women's rights. However, he acknowledges that these

freedoms require specific and differentiated forms of guarantees, tied to the particular nature of the violations to which women are predominantly exposed. Nonetheless, he emphasizes that this need is more connected to the sphere of effectiveness of rights than to their normative dimension.

Regarding the third right — self-determination in matters of abortion — Ferrajoli (1999) acknowledges it as a right exclusively pertaining to women, namely, the right to self-determination concerning motherhood (and, consequently, abortion). He argues that this is both a fundamental and exclusive right for women for several compelling reasons: because it is intrinsically linked to personal freedom, which necessarily includes a woman's autonomy to decide whether or not to become a mother, and because it reflects what John Stuart Mill referred to as individual sovereignty over one's own mind and body. For this right, sexual difference must translate into an unequal — or, more precisely, "gendered"— right.

This highlights the importance of the right to freedom, autonomy, and self-determination within the theoretical framework of differences, emphasizing a "right to difference" in which the law equally recognizes and values differences.

As for the right to privacy and intimacy, which also holds constitutional standing, it is worth recalling that it was the foundational right used in the *Roe v. Wade* decision by the U.S. Supreme Court. This case deemed a Texas law banning abortion unconstitutional. In 1973, the Court ruled that the Fourteenth Amendment, which addresses the right to privacy, encompassed a woman's decision — with her doctor — to terminate a pregnancy. The Court also determined that the right to privacy is not absolute; at a certain point, the state's interest in protecting prenatal life prevails (Siegel, 2016, p. 39). This protection is linked to the broader

concept of individual freedom, which depends on the absence of interference by others or groups in personal activities. In this sense, political freedom represents the dimension where individuals can act without third-party limitations (Berlin, 1981, p. 12).

The right to privacy assumes a protected intimate sphere, free from external interference, particularly regarding individuals' moral choices, which must be safeguarded in a secular and pluralistic state. The decriminalization of abortion would not make it obligatory for anyone but would allow moral choice by women who do not wish to terminate a pregnancy, free from religious interference.

Beginning with the notion of human dignity, from which the rights to freedom, self-determination, equality, and difference are derived, and adding the rights to privacy and intimacy within the context of moral choices in a secular state, I advocate for the decriminalization of abortion and the affirmation of voluntary motherhood.

Additional rights at stake, including reproductive health and family planning, will be addressed in the next chapter

2.3.2 Right to reproductive health and family planning

> *Carla, in her statement at the police station, said she regretted what she had done. Her parents do not know she is being charged or that she had an abortion, as her mother is a baptism minister in the Catholic Church and is completely against abortion. Her father does not accept abortion and would not allow such practice. She was treated at the hospital, which reported the case to the police.*
>
> *The fetus was found near Pérola Byington Square in a cardboard box on top of another box. The police officer contacted all hospitals nearby to report whether they had treated any cases of women with abortive conditions. The testimonies from the women were collected.*

Still, it was not possible to identify the mother of the fetus. In the testimonies, the women had abortions due to physiological issues.

The right to health gained constitutional status with the Federal Constitution of 1988. It was characterized as a fundamental right for both women and men, included in the list of social rights (art. 6). According to Sueli Gandolfi Dallari (1995, p. 23):

> [...] no Brasil a incorporação constitucional dos direitos sociais foi sobremaneira lenta. Nenhum texto constitucional se refere explicitamente à saúde como integrante do interesse público fundante do pacto social até a promulgação da Carta de 1988. A primeira República ignorou completamente qualquer direito social e evitou, igualmente, referir-se à saúde.

> [...] in Brazil, the constitutional incorporation of social rights was exceedingly slow. No constitutional text explicitly referred to health as an integral part of the public interest underlying the social pact until the promulgation of the 1988 Constitution. The First Republic entirely disregarded any social rights and likewise avoided mentioning health.

Only in 1946 was health recognized as an integral part of human rights, becoming a subject of the WHO, which defined it as complete physical, mental, and social well-being, and not merely the absence of disease or other ailments.

In the Federal Constitution of 1988, by virtue of its recognition as a fundamental social right, health is mentioned on various other occasions, reflecting society's concern for its protection. The social order, in addressing health, established that:

> Art. 196. A saúde é direito de todos e dever do Estado, garantido mediante políticas sociais e econômicas que visem à redução do risco de doença e de outros agravos e ao acesso universal e igualitário às ações e serviços para sua promoção, proteção e recuperação. (Brazil, 1988, no page).

> Art. 196. *Health is the right of all and the duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other harms and at ensuring universal and equal access to actions and services for its promotion, protection, and recovery.*

> The Federal Supreme Court (STF), in its judgment of the interlocutory appeal in the extraordinary appeal no. 255.627-1/RS, dated November 21, 2000, rapporteur Justice Nelson Jobim, emphasized that the provision contained in Article 196 is of immediate effectiveness (Brazil, 2000).

Therefore, health protection encompasses prevention, protection, and recovery, ensuring universal, comprehensive, and equal access to all actions and services, regardless of any financial contributions. Prevention is even one of the guidelines of the Unified Health System – SUS (art. 198, I). It is the responsibility of the State, although the Constitution does not prohibit the provision of health services by private entities. However, this does not exempt the Public Authority from the responsibility to regulate, supervise, and control such services, given the public relevance of this right (arts. 197 and 199).

Community participation is a principle of the Health System that is constitutionally guaranteed (art. 198, III), reflecting the participatory democratic system adopted in 1988.

Regarding reproductive health, before delving into the examination of domestic legislation, it is worth highlighting the parameters of international protection, particularly because the expression "sexual and reproductive rights" was internationally used, while the Constitution of 1988 still employs the term "family planning," which is less encompassing.

The World Conference on Human Rights (UN, 1993), held in Vienna in 1993, emphasized that "without women, rights are not human rights"[37]; "the rights of women and girls are an inalienable, integral, and indivisible part of universal human rights"; and "forced pregnancy is incompatible with the dignity and worth of the human person".

Article 12.1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW Convention), by the UN, stipulates that:

> Os Estados-partes adotarão todas as medidas apropriadas para eliminar a discriminação contra a mulher na esfera dos cuidados médicos, a fim de assegurar, em condições de igualdade entre homens e mulheres, o acesso a serviços médicos, inclusive referentes ao planejamento familiar. (ONU, 1979, p. 23).

> The States Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare, in order to ensure, on the basis of equality between men and women, access to healthcare services, including those related to family planning.

The Declaration of the International Conference on Population and Development of 1994, in Cairo, one of the international milestones on reproductive health from the perspective of reproductive rights guarantee, states, in principle 4, section VII:

O progresso na igualdade e equidade dos sexos, a emancipação da mulher, a eliminação de toda espécie de violência contra ela e a garantia de poder ela própria controlar sua fecundidade são pedras fundamentais de programas relacionados com população e desenvolvimento.

[...]

7.2 A saúde reprodutiva é um estado de completo bem-estar físico, mental e social e não simples a ausência de doença ou enfermidade, em todas as matérias concernentes ao sistema reprodutivo e a suas funções e processos. A saúde reprodutiva implica, por conseguinte, que a pessoa possa ter uma vida sexual segura e satisfatória, tenha a capacidade de reproduzir e a liberdade de decidir sobre quando, e quantas vezes o deve fazer. Implícito nesta última condição está o direito de homens e mulheres de serem informados e de ter acesso a métodos eficientes, seguros, permissíveis e aceitáveis de planejamento familiar de sua escolha, assim como outros métodos, de sua escolha, de controle da fecundidade que não sejam contrários à lei, e o direito de acesso a serviços apropriados de saúde que dêem à mulher condições de passar, com segurança, pela gestação e pelo parto e proporcionem aos casais a melhor chance de ter um filho sadio. De conformidade com definição acima de saúde reprodutiva, a assistência à saúde reprodutiva é definida como a constelação de métodos, técnicas e serviços que contribuem para a saúde e o bem-estar reprodutivo, prevenindo e resolvendo problemas de saúde reprodutiva. Isto inclui também a saúde sexual cuja finalidade é a intensificação das relações vitais e pessoais e não simples aconselhamento e assistência relativos à reprodução e a doenças sexualmente transmissíveis. (ONU, 1994, p. 42 and 62).

This definition is reiterated in the Beijing Conference Programme of Action of 1995, in section 94 (UN, 1995, p. 178).

progress in gender equality and equity, the empowerment of women, the elimination of all forms of violence against them, and the guarantee that women can control their own fertility are cornerstones of programs related to population and development.

[...]

7.2 reproductive health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity in all matters related to the reproductive system and its functions and processes. reproductive health, therefore, implies that individuals can have a safe and satisfying sexual life, the capability to reproduce, and the freedom to decide when and how often to do so. implicit in this last condition is the right of men and women to be informed and to have access to safe, effective, acceptable, and lawful methods of their choice for family planning, as well as other methods of fertility regulation that are not against the law. it also includes the right to access appropriate health services that enable women to go through pregnancy and childbirth safely and provide couples with the best opportunity to have a healthy child.

in accordance with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques, and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. this also includes sexual health, whose purpose is the enhancement of life and personal relationships and not

merely counseling and care related to reproduction and sexually transmitted diseases.

Regarding abortion, the Cairo Declaration (UN, 1994) states that it should not, under any circumstances, be promoted as a method of family planning. However, it was only at the International Conference on Women in Beijing in 1995, under section 106, "k" (UN, 1995, p. 182), the following year, that progress was made. All governments urged to strengthen their commitment to women's health; to address the health impacts of unsafe abortions as a significant public health issue; to reduce recourse to abortion by providing broader and improved family planning services; and, finally, to consider the possibility of reforming laws that impose punitive measures on women who have undergone illegal abortions.

This international development of reproductive health led to its recognition as a set of rights, as pointed out by Piovesan (1998, p. 170):

> Ineditamente, 184 Estados reconheceram os direitos reprodutivos como direitos humanos, concebendo o direito a ter controle sobre questões relativas à sexualidade e à saúde sexual e reprodutiva, assim como a decisão livre de coerção, discriminação e violência, como direito fundamental.

> Unprecedentedly, 184 States recognized reproductive rights as human rights, conceiving the right to have control over issues related to sexuality and sexual and reproductive health, as well as the free decision, without coercion, discrimination, or violence, as a fundamental right.

At the domestic level, the Federal Constitution of 1988 establishes that:

> Art. 226
> [...]
> § 7.º Fundado nos princípios da dignidade da pessoa humana e da paternidade responsável, o planejamento familiar é livre decisão do casal, competindo ao Estado propiciar recursos educacionais e científicos para o exercício desse direito, vedada qualquer forma coercitiva por parte de instituições oficiais ou privadas. (Brazil, 1988, no page).

> Based on the principles of human dignity and responsible parenthood, family planning is a free decision of the couple, with the State responsible for providing educational and scientific resources for the exercise of this right, and prohibiting any coercive measures by official or private institutions.

Therefore, knowing and using methods, means, and techniques for family planning is part of the right to reproductive health, which is guaranteed by the Constitution. The ability to freely decide how many children to have, the birth spacing, or even the choice not to have children is a fundamental right ensured to women, men, or couples. It is important to emphasize that reproductive health presupposes the capacity to enjoy a safe and satisfying sexual life (Piovesan, 1998, p. 173).

For the exercise of this right, the role of the Public Authority is essential in providing information, conducting research, and granting access to fertility control methods so that couples can exercise their right to make informed and conscious choices.

Reproductive rights, as defined by Flávia Piovesan (1998, p. 168), correspondem ao conjunto dos direitos básicos relacionados ao livre exercício da sexualidade e da reprodução humana [correspond to the

set of basic rights related to the free exercise of sexuality and human reproduction].

The author points out that:

> Historicamente, constata-se que a luta pelos direitos reprodutivos tem seu ponto de partida nas reivindicações femininas em torno da questão reprodutiva. Nesse sentido, os direitos reprodutivos refletiam a tensão entre a maternidade obrigatória, concebida como elemento de dominação do homem em relação à mulher, e a contracepção, entendida como forma de libertação. E a constante atenção que a questão dos direitos reprodutivos tem recebido no âmbito do movimento feminista deve-se à importância na vida da mulher, a quem incumbe, muitas vezes exclusivamente, arcar com as consequências da vida sexual – a gravidez, a criação dos filhos, etc. (Piovesan, 1998, p. 168).

> Historically, it is evident that the struggle for reproductive rights has its starting point in women's demands regarding reproductive issues. In this regard, reproductive rights reflected the tension between compulsory motherhood, conceived as an element of male domination over women, and contraception, understood as a form of liberation. The constant attention that the issue of reproductive rights has received within the feminist movement is due to its significance in a woman's life, as she is often solely responsible for bearing the consequences of sexual life – pregnancy, raising children, etc.

Piovesan (2005, p. 109) further notes that sexual and reproductive rights came to be understood as human rights since the Cairo Conference on Population and Development (1994) and they have a dual dimension. Therefore, they do not purely fit into either of the

traditional categories of civil and political rights versus economic and social rights, as they constitute a hybrid figure. They simultaneously require the sphere of freedom, individual self-determination, privacy, and intimacy, which includes the free exercise of sexuality and human reproduction, and at the same time, the formulation of public policies that can ensure sexual and reproductive health, access to information and to available safe methods.

It is Law No. 9,263, of January 12, 1996, that regulates family planning in Brazil. According to this law, family planning is guided by preventive and educational actions and by ensuring equal access to information, means, methods, and techniques available for fertility regulation.

Public policies for the sexual and reproductive health care of women are part of the *Política Nacional de Atenção Integral à Saúde da Mulher – Princípios e Diretrizes* [National Policy for Comprehensive Women's Health Care – Principles and Guidelines], from the Ministry of Health[38].

Some of the actions of the National Policy for Comprehensive Women's Health Care are:

- Family planning policies;
- Healthcare for women in cases of abortion as provided by law, which involves humane treatment for victims of sexual violence;
- healthcare in unsafe abortion cases[39].

The normative arrangement outlined, both internationally and domestically, affirms Brazil's duty to guarantee the reproductive health rights of Brazilian women, even urging it to review punitive legislation regarding abortion. The fundamental constitutional right to reproductive health includes, on the part of the State, the duty to act through specific public policies that can ensure women have access to family planning

and dignified care regarding unsafe abortion situations, as stated in the National Policy for Comprehensive Women's Health Care provisions.

Abortion, when performed by trained individuals with proper instruments, medication, and in a safe, sanitized, and comfortable environment, is a highly safe procedure with few risks of complications or side effects. However, when abortion, or its completion, is induced with the assistance of untrained individuals and outside an appropriate space in terms of hygiene and medical resources, it can result in numerous sequelae and health problems for the woman (Villela & Barbosa, 2011, p. 12).

It is from this reality that, within the policies for comprehensive health care for women, concern with unsafe abortion arises. The Ministry of Health issued, in 2005, the Technical Standard regarding humane care for unsafe abortion, which follows WHO guidelines. According to Villela and Barbosa (2011, p. 90):

> A normatização do Ministério da Saúde visa contemplar tanto procedimentos clínicos que devem ser realizados de acordo com circunstâncias específicas, como também prevê rotinas de atenção psicossocial que devem ocorrer em paralelo ao atendimento gineco-obstétrico. Ademais, contribui para esclarecer equívocos, mostrando, por meio da divulgação das estimativas de aborto induzido no país, que essa é uma prática frequente, inserida na vida das mulheres, das famílias e das comunidades.

> The regulation from the Ministry of Health aims to cover both clinical procedures that must be performed according to specific circumstances, as well as to outline psychosocial care routines that should occur alongside gynecological and obstetric care. Furthermore, it helps to clarify misunderstandings by showing, through the

DISSEMINATION OF ESTIMATES OF INDUCED ABORTION IN THE COUNTRY, THAT THIS IS A COMMON PRACTICE, INTEGRATED INTO THE LIVES OF WOMEN, FAMILIES, AND COMMUNITIES.

Abortion can be the unforeseen outcome, in theory, not imagined, of an unwanted pregnancy and can be observed from a perspective of fertility control, the exercise of reproductive rights, and family planning:

> Tomar o aborto como fato social significa trazer à luz as condições estruturais de um país desigual em termos de acesso a bens materiais e simbólicos e da ilegalidade de aborto, ao mesmo tempo em que mecanismos para burlar a lei estão disponíveis com maior ou menor facilidade e segurança a depender da situação de classe das pessoas envolvidas.
> [...]
> Quando uma gravidez inesperada ocorre, a decisão sobre seu desfecho/curso é sempre contingencial, baseada no exame da situação em jogo, independentemente de posições morais e/ou religiosas prévias que os protagonistas tenham sobre o aborto. Não há uma postura *a priori* já tomada pelo par, contrária ou a favor do aborto, em caso de uma gravidez imprevista. Cada contexto de gravidez é avaliado em suas diversas circunstâncias: *status* do vínculo afetivo-sexual, acordo/desacordo entre parceiros sobre ter ou não o filho, existência ou não de família prévia constituída e filhos anteriores, presença de outros projetos existenciais, condições materiais de existência para acolher o filho, anuência ou não da família/pais etc. (Heilborn et al., 2012, p. 226 and 232)

TAKING ABORTION AS A SOCIAL FACT MEANS SHEDDING LIGHT ON THE STRUCTURAL CONDITIONS OF A COUNTRY THAT IS UNEQUAL IN TERMS OF ACCESS TO MATERIAL AND SYMBOLIC

> goods, and the illegality of abortion, while at the same time, mechanisms to bypass the law are available with varying degrees of ease and safety depending on the class situation of the people involved.
>
> [...]
>
> When an unexpected pregnancy occurs, the decision about its outcome/course is always contingent, based on an examination of the situation at hand, regardless of prior moral and/or religious positions the individuals involved may have on abortion. There is no a priori stance taken by the couple, either against or in favor of abortion, in the case of an unforeseen pregnancy. Each pregnancy context is evaluated in its various circumstances: the status of the emotional-sexual bond, agreement/disagreement between partners about having or not having the child, the existence or not of a previous family and children, the presence of other existential projects, material conditions to support the child, approval or disapproval from family/parents, etc.

The research developed by Heilborn et al. (2012) on unintended pregnancy and abortion in Rio de Janeiro, where they analyze gender and generation in abortion decision-making processes based on thorough interviews, shows how the decision for abortion is contingent and not necessarily linked to a lack of desire for motherhood, but depends on relational/marital issues.

Reproductive health is one of the fundamental human rights of women, and abortion, although it should not and cannot be considered a contraceptive method, is part of this right to family planning and fertility control. As Simone de Beauvoir said when interviewed back in the 1970s:

> Esperamos convencer o público de que é preciso assegurar à mulher o direito de procriar livremente, isto é, ajudá-la a suportar as cargas da maternidade – em especial através de berçários – e também a recusar as maternidades não desejadas, graças a práticas anticoncepcionais e ao aborto. Exigimos que ele seja livre e que a mulher decida sozinha. (Schwarzer, 1986, p. 45)

> We hope to convince the public that it is necessary to ensure women the right to procreate freely, that is, to help them bear the burdens of motherhood – especially through nurseries – and also to refuse unwanted pregnancies, thanks to contraceptive practices and abortion. We demand that it happens freely and that the woman decides alone.

With the approach to reproductive rights and family planning, this part of the book concludes, aiming to highlight the fundamental constitutional rights connected to the abortion discussion. It is understood that these rights should be considered in the balance with the right to the fetus's life. Ignoring them means stripping women of their human dignity, violating all other related rights.

However, beyond ensuring and balancing these rights, it is important to reflect on the criminalization and the use of criminal law to address the issue of abortion from the perspective of criminology and feminist criminology. In this regard, it is also crucial to understand the reality of abortion, who these penalized women are, and whether there is any effectiveness in this criminalization, which causes harm and suffering to thousands of women who undergo abortions. This will be explored in the next part.

3

THE INCONSTITUTIONALITY OF ABORTION IN BRAZIL

3.1 THE CRIMINALIZATION OF ABORTION AS AN ASPECT OF SEXUALITY AND IDENTITY CONTROL WITHIN THE STRUCTURE OF GENDER SOCIAL RELATIONS. THE CONSTRUCTION OF MANDATORY MOTHERHOOD AS A FACTOR OF WOMEN'S IDENTIFICATION.

> *Luísa was 16 years old. She got pregnant by her 22-year-old boyfriend, who was separated and already had a child. When they began the relationship, she was a virgin and did not want to have the child, nor did she want her father to know she was pregnant. She decided to have an abortion, but the first clinic she visited refused to perform the procedure because she was a minor. Her boyfriend arranged for her to go to another clinic where she could undergo the abortion and paid for it. A friend of his accompanied her that day. She experienced a lot of pain afterward but took the bus home. She ended up suffering severe injuries, had her uterus removed because it was completely perforated, and spent 20 days in the ICU. She also had her urethra removed, as well as half of her bladder, and now lives with an artificial urethra.*
> *She ended up suffering from serious injuries. After going home, she felt very ill and was hospitalized, with the hospital notifying the police station. Her boyfriend claimed that she wanted the abortion out of fear of her family and that it was she who led him to the clinic.*

The criminalization of abortion affects a specific and determined being whose body has the capacity to gestate other beings. In this sphere, it is possible to understand that the reasons for this criminalization depend on the analysis of how law, from a historical and political

standpoint, has perceived and regulated women and their bodies, as here it is argued that the law is not neutral in relation to sex.

The subordination of women has, among its objectives, the discipline and control of their bodies (Facio & Fries, 1999, p. 13).

The criminalization of abortion refers to a specific human being, named by the Brazilian Penal Code as a "pregnant woman."[40]. The actions described in the law punish those who have the ability to gestate, i.e., individuals who carry the embryo — women. At first, it may seem that the decision to punish women who perform abortion on themselves or consent to a third party performing the abortion stems from the simple biological fact that women have gestational capacity. If men had the ability to gestate, they too would be equally punished. In this sense, the law would supposedly be neutral with respect to the sex of individuals, punishing them equally, regardless of their biological sex. However, this is not what happens. Justice Luís Roberto Barroso, in the judgment of Habeas Corpus 124.306 (Brazil, 2016, emphasis added), cites[41]: "*como bem observou o Ministro Carlos Ayres Britto, valendo-se de frase histórica do movimento feminista*: '*se os homens engravidassem, não tenho dúvida em dizer que seguramente o aborto seria descriminalizado de ponta a ponta*'" [as Justice Carlos Ayres Britto rightly noted, drawing on a historic phrase from the feminist movement: 'If men could get pregnant, I have no doubt that abortion would surely be fully decriminalized.'].

Frances Olsen (1990), in analyzing the theme of sex in Law, highlights that, since classical liberal thought, the structure of thinking has been shaped by dualisms or opposing pairs (rational/irrational, active/passive, reason/emotion, nature/culture, abstract/concrete, objective/subjective, etc.). According to the author, this system of dualisms ends up being sexualized and hierarchized, meaning one half of the dualism is considered masculine and the other half, feminine. The dualisms are not equal, as they are hierarchized, with the masculine side being

considered superior. This sexual identification of dualisms is sometimes descriptive and sometimes normative. The Law would align with the masculine side of the dualisms. It is assumed that the Law is rational, objective, abstract, and universal, just as men consider themselves. On the other hand, it is assumed that the law is not irrational, subjective, or personalized, just as men consider women to be.

When discussing sociocultural discrimination, evident through the naturalization of behaviors and characteristics that are considered inherent to one's natural sex (innate), but which are in fact socially constructed and may not align with each individual's desires and essence, Guilherme Assis de Almeida and Maíra Cardoso Zapater (2013, p. 104) emphasize how this discrimination impacts the legal and juridical sphere: *Essa discriminação sociocultural repercute na esfera jurídico-legal, da qual é possível extrair elementos que revelam, como um espelho da realidade social, a crença em diferenças tidas como naturais e que justificariam um tratamento jurídico desigual.* [This sociocultural discrimination reverberates in the legal-juridical sphere, from which it is possible to extract elements that reveal, like a mirror of social reality, the belief in differences considered natural and that would justify unequal legal treatment.]

From the moment sexual difference translates into unequal legal treatment of these differences, and the male sex is seen as the "model of humanity", as pointed out by Alda Facio and Lorena Fries (1999, p. 6), it becomes clear that the Law, as a product of a specific time and culture, reflects the inequality of treatment between the sexes, with no real neutrality.

The authors argue that it is feminism that enables this critical perspective on the patriarchal structure. Feminism, as a social and political movement, ideology, and theory, arises from the awareness of women as a collective group that is subordinated, discriminated against, and oppressed by the collective of men in patriarchy. Feminism is not

just concerned with advocating for women's rights, but with deeply questioning all power structures, including those based on gender.

As a theory, feminism allows for the questioning of the state's criminalization of abortion and its supposed neutrality. The fact is that punitive choices are political and come from a system that attributes a series of meanings to those who are socially designated as "women" and "pregnant women". This designation typically starts with the most obvious biological sexual differentiation, where physical characteristics such as external and internal sexual organs identify humans as men or women. The criminalization of abortion and women's bodies is part of a broader context of women's oppression, control over their sexuality, and gender oppression[42].

In this regard, the criticism by Borges and Coelho Netto (2013, p. 321) that the function of Criminal Law concerning women is clear, as it aims to punish them for not fulfilling the socially defined role for the feminine being pre-determined by the patriarchal gender order: that of the woman who deviates from the standard, understood as that of the reproducer, the mother, or the wife. The authors classify the crime of abortion, alongside infanticide and abandonment of a vulnerable person, as one of the gender-specific criminal offenses that have certain particularities:

> A primeira particularidade e, sem dúvidas, a mais visível é a de que os referidos crimes somente são passíveis de serem cometidos por mulheres. Tais práticas convertidas em delitos trazem em si possibilidade de ampla análise política e social do papel da maternidade atribuído à mulher, e como a negação desta função primordial delegada ao sexo feminino repercute em nossa sociedade através da ideologia machista e da cultura androcêntrica.

> The first particularity, and undoubtedly the most visible, is that these crimes can only be committed by women. These practices, when turned into offenses, allow for a broad

At this point, it is important to historically situate the Penal Code to understand the criminalization of this social phenomenon, considering that the section criminalizing abortion dates back to 1940. In that decade, contraceptive pills had not yet been invented, and women were defined, in terms of their identity and constitution as subjects, by the maternal role. It was the act of "being a mother" that marked, identified, and constituted women as individuals. Not wanting to be a mother — or wanting to plan motherhood, determining the number of children, or even the spacing between them — meant denying their "essence as women". Such denial violated the prevailing moral and social codes. This violation, given the perceived violence it represented against the established order, could only be appropriately punished through the criminalization of women who, in any way, dared to reject the norm.

Similarly, the formation of the bourgeois family placed women within specific roles, which necessarily included compulsory motherhood and child care responsibilities.

Kehl (2016, p. 37-38, emphasis in original) highlights the formation of the nuclear and bourgeois family and the expectations placed upon women within this model:

> O domínio público, espaço das transações comerciais, sociais e políticas das grandes cidades do século XIX era o espaço da convivência entre uma *multidão de desconhecidos,* formada por uma diversidade de tipos sociais sem precedentes na história do Ocidente. Em oposição ao espaço social dos estranhos, no

qual o sujeito precisa estar constantemente atento aos outros e *si mesmo,* construiu-se a família nuclear moderna como lugar de intimidade, privacidade, relaxamento. Para os homens, condenado a viver o dia a dia na selva das cidades, a família tornava-se um lugar sagrado, cuja harmonia e cuja tranquilidade estariam a cargo daquela que cada um escolheu para esposa.

A família nuclear e burguesa cria um padrão de feminilidade cuja principal função é promover o casamento entre a mulher e o lar. Porém o imaginário social nunca é unívoco. Outros discursos e outras expectativas entraram em choque com os ideais predominantes da feminilidade. De um lado submissão feminina contrapunha-se aos ideais de autonomia de todo sujeito moderno; aos ideais de domesticidade se contrapunham o de liberdade; à ideia de uma vida predestinada ao casamento e à maternidade se contrapunha a ideia, também moderna, de que cada sujeito deve escrever seu próprio destino, de acordo com sua própria vontade.

The public domain, the space for commercial, social, and political transactions in the large cities of the 19th century, was a setting for interactions among a multitude of strangers—a diversity of social types unprecedented in Western history. In contrast to this social space of strangers, where individuals needed to remain constantly alert to others and themselves, the modern nuclear family was constructed as a place of intimacy, privacy, and relaxation. For men, condemned to live their daily lives in the jungle of urban environments, the family became a sacred refuge, whose harmony and tranquility were entrusted to the woman chosen as a wife. The nuclear and bourgeois family established a standard of femininity, where the primary function was to unite the woman with the home. However, social imagination

> is never univocal. Other discourses and expectations clashed with the predominant ideals of femininity. On one side, female submission opposed the ideals of autonomy for every modern subject; domesticity ideals conflicted with the ideal of freedom; and the notion of a life predestined for marriage and motherhood was challenged by the modern idea that every individual should write their own destiny according to their will.

Kehl (2016) highlights the paradox of modernity: on one hand, the ideal of femininity was rooted in marriage and motherhood; on the other, modernity championed the autonomy of the individual to make choices and pursue life projects—though this autonomy was reserved exclusively for men.

Abortion, however, disrupts this prescribed role for women by granting them decision-making power over their own bodies, lives, and aspirations. Such a profound challenge to the established order finds its response in criminalization—the strongest form of state control over bodies—deemed the only adequate and sufficient answer by the men who legislate over women's bodies and interpret the law. This argument does not advocate abortion as a contraceptive method but rather supports the possibility of its use in cases of unwanted pregnancy, without such action being criminalized.

Márcia Arán (2003, p. 404) observes that modernity, particularly in the late 18th and 19th centuries, assigned women to the domains of the private sphere and, consequently, to motherhood. The emerging scientific perspective of the time reinforced this maternal role, penetrating the female body and defining women's essence. In the 20th century, especially during the 1960s and 1970s, women began to shift away from the destiny of motherhood, enabled by the ability to separate sexuality from reproduction with the advent

of contraceptive pills. This development allowed women not only to free themselves from a function nearly imposed on their bodies but also to exercise the choice of whether or not to have children.

The relationship between the control of sexuality and the criminalization of abortion is historically grounded. Gayle Rubin (2017), in the text *Pensando o sexo: notas para uma teoria radical das políticas da sexualidade*, notes that the sphere of sexuality also has its internal politics, inequalities, and modes of oppression. Like other aspects of human behavior, the institutional forms of sexuality in a given time and place are products of human activity. These forms are imbued with conflicts of interest and political maneuvers, both deliberate and incidental. In this sense, sexuality is always political. However, there are historical periods when sexuality is more explicitly contested and excessively politicized. During such times, the domain of erotic life is, indeed, renegotiated.

The author continues by stating that, in England and the United States, the late 19th century was one of those periods. It is interesting to note that whenever various aspects involving sexuality were addressed (campaigns encouraging chastity, the criminalization of prostitution, discouragement of masturbation, crusades against obscene literature, paintings featuring nudity, etc.), abortion and information on birth control were included in the "package," meaning that the control of sexuality was treated as intimately tied to the control of reproduction.

Gayle Rubin (2017) reports that sexual legislation dates back to the moralistic crusades of the 19th century and that the first anti-obscenity law in the United States was passed in 1873. It was the Comstock Act, named after Anthony Comstock, an early anti-pornography activist and founder of the New York Society for the Suppression of Vice. This act made the production, advertisement, sale, possession, mailing, or importation of obscene books or photographs a federal crime.

However, what is important to emphasize is that the law also prohibited contraceptive or abortive drugs, as well as devices and information about them.

In other words, why address contraception and abortion alongside obscenity, pornography, prostitution, and vice suppression? It suggests, apparently, a clear connection between abortion and contraception to the control and repression of sexuality. Only in 1975 did the Supreme Court declare unconstitutional the part of the law that dealt with the prohibition of materials used to disseminate information about contraception and abortion.

Ferrajoli (2003, p. 12) highlights that, in public debate, a woman's right to decide regarding her maternity is usually presented as a "right *to* abortion", that is, as a positive freedom, which would consist of the freedom to abort. However, it is forgotten that, first and foremost, it is a negative freedom — namely, a woman's right not to be forced to become a mother against her will. The prohibition of abortion does not merely forbid an action; it compels a life choice, such as motherhood.

In addition to this construction of mandatory motherhood as an identifying characteristic of women, alongside the control of their sexuality, mandatory motherhood is also regarded as an ideal life goal for all women. Over time, this has also led to the construction of an ideal of motherhood that increasingly limits any other life projects a woman may wish to pursue. This ideal is so difficult to bear and achieve that it has led hundreds of women to simply not want to have children or postpone the decision until other life projects, which would not have been reconcilable with the contemporary maternal ideal, are fulfilled.

Sabadell and Dimoulis (2008, p. 328) emphasize this internalization of motherhood as a "natural" role for women, even by the Federal Constitutional Court of Germany, which, in a 1975 decision on the constitutionality of abortion, stigmatized women by stating that they

reject pregnancy because they do not want to accept the sacrifices associated with it or fulfill natural maternal duties; that the "abortive" woman seems to violate the laws of nature by being selfish, and that Criminal Law should censure her not only for the act committed but also for her attitude, which contradicts the supposed natural order.

Therefore, critically discussing the criminalization of abortion in Brazil requires critically analyzing the law, particularly Criminal Law, through the lens of critical theories and feminism. A purely dogmatic study of criminal law does not seek to understand the reasons for criminalization, its representations, and meanings. Equipped with this theoretical framework, it is possible to reconsider legislative choices, which are political and reflect specific conceptions of gender roles and possibilities for women and men.

However, before engaging in this critical discussion, it is necessary to address what exists, in terms of criminal law dogmatics, regarding abortion, which will be done in the next section.

3.2 THE PRIMARY CRIMINALIZATION OF ABORTION AND THE PENAL CODE OF 1940

> *Sister found dead by her brother. She had ingested sulfuric acid, a substance found in the autopsy. When they opened the fridge, they found a fetus in a mayonnaise jar.*

Forty years ago, Juarez Cirino dos Santos (1978, p. 13) argued that certain prohibited behaviors (drug consumption, the exploitation of prostitution, illegal gambling, abortion, etc.) defined social practices whose extent could only be compared to the magnitude of

the respective normative hypocrisy. The author continued by stating that the issue of abortion, in light of the legal framework, presented itself under two distinct categories: it is either prohibited (criminal abortion) or allowed (therapeutic or humanitarian abortion).

The aim of this chapter is to approach the problem through penal dogmatics, which organizes the matter according to the principle of legality, focusing on legal definitions and highlighting the systematic position, the objective and subjective structure of the conduct, the qualified forms, and the types of abortion allowed, while also making the same observation as Santos (1978, p. 14):

> Esse método, necessário para precisar os conteúdos e limites normativos, fragmenta o problema real para adequá-lo às formas da lei, construindo uma perspectiva que não abrange todo o problema: privilegia a dimensão formal, variável conforme a política oficial, subordinando a base material, fisio-patológica e social, constante.

> This method, necessary to define the normative contents and limits, fragments the real problem to adapt it to the forms of the law, constructing a perspective that does not encompass the entire issue: it privileges the formal dimension, which varies according to official policy, while subordinating the material, physiological, and social basis, which remains constant.

The author, based on this critique, does not shy away from developing a method opposite to that of dogmatics, addressing legal repression, its subsequent effects, the perceptions and attitudes of the woman, in other words, an alternative criminal policy, which is also dealt with throughout this work.

The primary criminalization of conduct is a direct product of the Legislative Power through the creation of criminal norms, typifying certain behaviors and events, establishing penalties, and defining agents. It is believed that one of its functions would be general negative prevention, meaning that, through the imposition of a penalty, the prohibited conduct would not be carried out. This is a form of social control from a democratic point of view, self-imposed, if it is considered that laws are made by observing democratic parameters, through elected representatives.

The current Penal Code encompasses six types of abortion: self-induced abortion (Article 124, first part), consensual abortion (Article 124, second part), non-consensual abortion (Article 125), provoked abortion without the woman's consent (Article 126), necessary or therapeutic abortion (Article 128, section I), and sentimental abortion (Article 128, section II).

The crime of self-induced abortion, Article 124 of the Penal Code, is a personal crime that cannot be committed by another person but only by the woman who performs the act. Various forms of behavior can be used to provoke abortion, as long as they are suitable to produce the result. Folk healers, prayers, rituals, and similar methods are not suitable, meaning it becomes an impossible crime due to the absolute ineffectiveness of the method[43]. The following legal conditions are required: intent, pregnancy, abortive maneuvers, and the death of the fetus, embryo, or ovum. The act of "provoking abortion" aims to terminate the pregnancy and eliminate the product of conception. If the abortion was spontaneous, there is no abortion crime. If experts cannot confirm that the abortion was induced, there is no certainty about the existence of the crime, so one cannot speak of a criminal abortion. (Bitencourt, 2014, p. 167-168)

In the analysis conducted on the cases examined, in the First Jury Court of the Capital, it was found that the overwhelming majority of cases were dismissed because it was not possible to prove, through the evidence

presented, that the abortion had been induced by the pregnant woman. There are numerous cases where there was uncertainty — referred to by the author — regarding the existence of the crime. This is demonstrated by the following decision issued by the São Paulo Court of Justice:

> Na hipótese, a despeito da aceitação da suspensão do feito pela paciente e seu namorado, o corréu, não existe a prova da materialidade do crime, assim relatado no laudo de exame de corpo de delito, tratando-se de crime que deixa vestígios. E mesmo que se admita a ingestão do medicamento "cytotec" pela gestante, sem que exista um estudo vigoroso e definitivo dos possíveis efeitos colaterais da medicação, entre os quais, o possível efeito interruptivo da gestação, e assim também da relação de causa e efeito entre a ingestão e o aborto, não há como se considerar nem indiciária a justa causa., para tanto não bastando a confissão do agente. (Sao Paulo, 2017f, no page)

> In this case, despite the acceptance of the stay of the proceedings by the patient and her boyfriend, the co-defendant, there is no evidence of the materiality of the crime, as stated in the body of the crime report, considering it is a crime that leaves traces. Even if the ingestion of the "cytotec" medication by the pregnant woman is admitted, without a thorough and definitive study of the possible side effects of the medication, including its potential to interrupt pregnancy, and thus the cause-and-effect relationship between the ingestion and the abortion, there is no way to consider even indirect evidence as justifiable cause. For this, the confession of the agent alone is not sufficientrtion, there is no way to consider even indirect evidence as justifiable cause. For this, the confession of the agent alone is not sufficient.

The Penal Code considers abortion induced by the pregnant woman to be a crime against life, with a prescribed penalty ranging from one to three years.

Among criminal law scholars, although the Penal Code does not explicitly address the issue, there is a prevailing understanding that life, as a protected legal asset, is safeguarded from conception:

> Existe a ausência de uma definição legal, em que momento que se protege legalmente o feto, daí a tendência desde a concepção, até o parto. Na posição de Nelson Hungria: "o código, ao incriminar o aborto, não distingue entre óvulo fecundado, embrião ou feto: interrompida a gravidez, antes de seu termo normal, há crime de aborto. Em qualquer fase da gravidez (desde concepção até o início do parto, isto é, até o rompimento da membrana amniótica), provocar a sua interrupção é cometer crime de aborto". (Franco, 1955, p. 277)

> There is a lack of a legal definition as to when the fetus is legally protected, which leads to the tendency to protect from conception until birth. According to Nelson Hungria's position: "the code, by criminalizing abortion, does not distinguish between the fertilized egg, embryo, or fetus: once the pregnancy is interrupted before its normal term, there is a crime of abortion. At any stage of pregnancy (from conception until the onset of labor, that is, until the rupture of the amniotic membrane), causing its interruption is committing the crime of abortion."

Abortion is included among crimes against life; the protected legal interest is intrauterine life, from the fertilization of the egg (conception). By protecting intrauterine life, the Penal Code aligns

with the Civil Code, which provides that a person's civil personality begins at birth with life; however, it safeguards, from conception, the rights of the unborn (Civil Code, Art. 2) (Pierangeli, 2013, p. 302).

In the case of self-induced abortion, there is only penal protection of the right to life, with the fetus being the holder of that right. Under the Civil Code, the fetus is not considered a person and therefore has an expectation of rights; however, in criminal law, it is regarded as a person. The protection pertains to the life of this person, which is the product of conception. The crime of abortion is classified in the Penal Code as "Crimes Against the Person", in the chapter on "Crimes Against Life" (Jesus, 2011, p. 152).

The protection of the life of the developing human being, which is the life of the fetus, is the guiding principle of the Penal Code. Whether it is considered a human life is of little importance, as it is already viewed as a human entity, a *spes personae* (Costa Júnior, 2007, p. 153).

Some authors argue that protection should begin from the implantation of the fertilized egg in the uterus, known as nidation, because an alternative interpretation, which suggests protection from fertilization, would challenge certain contraceptive methods that are widely accepted in Brazil, as highlighted by Mirabete & Fabbrini (2013, p. 59-60).

There is significant divergence among scholars on the beginning of life: whether it occurs at fertilization or with the implantation of the egg in the uterus (nidation). Given that it is allowed in Brazil the sale of IUDs and contraceptives, aimed at accelerating the passage of the egg through the fallopian tube to the uterus without implantation, or even altering the endometrium to prevent implantation, it seems reasonable to conclude that the doctrine which places the beginning of life at nidation aligns better with Brazil's factual reality. Otherwise, all those who use the contraceptive methods described would be criminalized.

Following the same line of thought, Greco (2014, p. 91-94) states: *O início da vida vem a partir da concepção ou fecundação, para fins de proteção por via penal, a vida somente terá proteção após a nidação, sendo que se não houver a nidação não há porque a proteção*. [The beginning of life comes from conception or fertilization, but for the purpose of protection through criminal law, life will only have protection after implantation. If implantation does not occur, there is no reason for protection.]

Similarly, Prado (2013, p. 116-117) argues: *O objeto material do delito é o embrião ou o feto humano vivo, implantado no útero materno, protege-se a vida intrauterina, ou seja, seu ponto inicial é a nidação*. [The material object of the crime is the embryo or the living human fetus, implanted in the mother's womb, protecting intrauterine life, meaning its starting point is implantation.]

Thus, it is evident that, although the goal is to protect life, the interpretation of the Brazilian Penal Code, which criminalizes abortion, often reveals disagreements about when this legal protection should begin. Some authors prefer to choose nidation without clear biological reasoning, simply to adapt to the common use of certain contraceptives that could be considered abortive and thus criminalize women who use them. This appears to frame the discussion of the beginning of life as only one of the criteria to be considered in the context of abortion decriminalization, weighing the balance between the life of the fetus and the life of the mother.

When opting for the decriminalization of abortion and its regulation, even within the penal framework, the various models found often reflect compromises between the protection of both lives (fetus and pregnant woman), as demonstrated by Roxin (2002, p. 165 and 174):

> A proteção da vida em formação no corpo da mãe, é tratado de forma diversa em determinadas culturas, ou seja, há quem tutele o embrião

que se desenvolve no corpo da mãe como um homem nascido, há quem trate os embriões produzidos extracorporeamente, como sujeitos de tutela jurídica. O ordenamento jurídico moderno segue um caminho intermediário e opta por dois modelos: "solução de indicações" e "solução de prazo", na primeira o aborto é punível, podendo ser justificado e impunível por situações em que o médico indica para a sobrevivência da mãe, delitos sexuais. Na solução de prazo é determinado prazo até 3 meses e a mãe pode interromper a gravidez por seu desejo, sem mencionar o motivo; após esse decurso, somente com autorização médica. Na Alemanha, após o que chamam de modelo de aconselhamento, apresenta-se um compromisso entre a solução de prazo e solução de indicações. É impune o aborto feito por médico a pedido da gestante nas primeiras 12 semanas, desde a concepção, se a gestante estiver se submetido a aconselhamento. O foco desse aconselhamento é a proteção da vida, ajudando a aconselhar a tomar uma decisão responsável.

The protection of the developing life within the mother's body is treated differently across various cultures. Some consider the embryo developing inside the mother's body as an individual with the same legal protections as a born person, while others treat embryos created outside the body as subjects of legal protection. Modern legal systems tend to follow an intermediary path and opt for two models: the "solution of indications" and the "solution of time." In the first model, abortion is punishable but can be justified and thus not penalized in cases where the doctor indicates the procedure for the survival of the mother or in cases of sexual crimes. In the solution of time, a period of up to three months is established during which the mother can terminate

> the pregnancy without specifying a reason; after this period, the procedure can only be performed with medical authorization. In Germany, following what is called the "counseling model," a compromise between the solution of time and solution of indications is presented. An abortion performed by a doctor at the request of the pregnant woman within the first 12 weeks from conception is not penalized, as long as the woman has undergone counseling. The focus of this counseling is to protect life by assisting the woman in making a responsible decision.

The author supports the more generous "solution of indications" approach, where abortion is viewed as a case of conflict that requires a balance in which the vital interests of the pregnant woman take precedence over the embryo.

The Brazilian Penal Code, however, adopted a much more restrictive model of indications, as will be explained below:

3.2.1 Legal abortion cases

> *The mother was called to the hospital because her daughter passed away. She had been hospitalized for three days. An abortion had occurred, followed by complications. According to the doctors, she had claimed to have used Cytotec, but nothing was proven.*

In Brazil, a restrictive model of indications was adopted regarding abortion, allowing abortion only if there is no other way to save the life of the pregnant woman or if the pregnancy results from rape. In both cases, it must be performed by a doctor. Sabadell and Dimoulis (2008,

p. 335), in the case of therapeutic abortion, as per Article 128, I, of the Penal Code, draw attention to an interesting issue in criminal law. The justification for performing an abortion if there is no other way to save the woman's life would initially be considered unnecessary due to the provision of the "state of necessity" (Article 24 of the Penal Code) in the general part.

According to the authors, the provision in Article 128, I, would be more restrictive compared to the general provision in Article 24 because, by applying only the "state of necessity", abortion could be defended when there is a risk of harm to the woman's health, and not as Article 128, I, stipulates, only if there is no other way to save her life. They argue that if the understanding is that Article 128 should prevail as a "specific law", it should be considered unconstitutional because it disproportionately limits the woman's fundamental rights and contradicts the principle of equality. In other words, according to Article 128, I, of the Penal Code, a risk to the woman's health would not be considered sufficient grounds for an abortion unless it is a risk to her life. The authors suggest that the doctrine proposes that this issue, of understanding abortion as possible in the case of a risk to the woman's health, could be overcome by considering it as conduct not culpable due to the unenforceability of a different behavior.

The possibility of abortion in cases of rape, although existing since 1940, has always faced several obstacles, whether related to the availability of services[44] that perform the abortion in these circumstances, or due to the long-standing belief that a police report of the rape incident was necessary. It was only in 2005 that the Ministry of Health issued a Technical Standard regarding the organization of services, establishing various guidelines for the care provided. Even today, there are still many obstacles to performing abortions in the cases permitted by the Penal Code, which is believed

to be due to the stigma surrounding the abortion debate and even the movement aimed at further restricting its scope, as previously discussed throughout this book. An abortion hypothesis that was not included in the original wording of the Penal Code but resulted from a decision by the Federal Supreme Court is also part of the set of indications where abortion is permitted, as will be discussed next.

3.2.2 Abortion in cases of anencephaly[45]

The *Confederação Nacional dos Trabalhadores na Saúde* – CNTS [National Confederation of Health Workers], a third-degree trade union entity within the confederative system, based on Article 102, § 1, of the Federal Constitution, and Articles 1 and following of Law No. 9,882 of December 3, 1999, filed a Claim of noncompliance with a fundamental precept (*Arguição de Descumprimento de Preceito Fundamental* - ADPF), indicating as violated precepts Articles 1, IV (dignity of the human person), 5, II (principle of legality, freedom, and autonomy of will), and Articles 6 and 196 (right to health), all from the Constitution of the Republic, and, as the public authority act causing the violation, the set of norms represented by Articles 124, 126 and 128, I and II, of the Penal Code.

The violation of the fundamental precepts invoked in the ADPF stemmed from a specific application that has been given to the mentioned provisions of the Penal Code by several judges and courts: the prohibition of performing the therapeutic anticipation of childbirth in cases of anencephalic fetuses, a pathology that makes extrauterine life absolutely unviable. The request was for the Federal Supreme Court (STF) to interpret these norms in accordance with the Constitution, declaring the unconstitutionality of the application of the Penal Code provisions in the described case, recognizing the right of a pregnant

woman carrying an anencephalic fetus to undergo the appropriate medical procedure.

In the claim, the argument was established that the therapeutic anticipation of childbirth is not an abortion, that anencephaly makes the fetus unviable, and that the impossibility of anticipating childbirth violates fundamental precepts, such as the dignity of the human person, creating an analogous situation to torture, as well as the principles of legality, freedom, autonomy of will, and the right to health. The petition requested an interpretation in accordance with the Constitution so that the articles of the Penal Code related to this matter would not be obstacles to performing the therapeutic anticipation of childbirth, considering that in 1940, there was no possibility of diagnosing an anencephalic fetus with the medical resources available at that time.

The case of Habeas Corpus No 84.025-6/RJ was mentioned, which dealt specifically with a request for the anticipation of childbirth of an anencephalic fetus. This was the first time the STF would have the opportunity to address the issue. Unfortunately, before the judgment could take place, the pregnancy reached term, and the anencephalic fetus died seven minutes after birth. Justice Joaquim Barbosa, the rapporteur assigned to the case, published his vote, which was aligned with the argument presented in the claim (ADPF):

> Em se tratando de feto com vida extrauterina inviável, a questão que se coloca é: não há possibilidade alguma de que esse feto venha a sobreviver fora do útero materno, pois, qualquer que seja o momento do parto ou a qualquer momento que se interrompa a gestação, o resultado será invariavelmente o mesmo: a morte do feto ou do bebê. A antecipação desse evento morte em nome da saúde física e psíquica da mulher contrapõe-se ao princípio da dignidade da pessoa humana, em sua perspectiva da liberdade, intimidade e autonomia privada? Nesse caso, a

eventual opção da gestante pela interrupção da gravidez poderia ser considerada crime? Entendo que não, Sr. Presidente. Isso porque, ao proceder à ponderação entre os valores jurídicos tutelados pelo direito, a vida extrauterina inviável e a liberdade e autonomia privada da mulher, entendo que, no caso em tela, deve prevalecer a dignidade da mulher, deve prevalecer o direito de liberdade desta de escolher aquilo que melhor representa seus interesses pessoais, suas convicções morais e religiosas, seu sentimento pessoal. (Brazil, 2004, no page)

In the case of a fetus with an unviable extrauterine life, the issue that arises is: there is no possibility for this fetus to survive outside the mother's womb, as any moment of childbirth or any moment the pregnancy is interrupted will invariably lead to the same result: the death of the fetus or the baby. Does the anticipation of this event — death — on behalf of the physical and psychological health of the woman conflict with the principle of human dignity, in its perspective of liberty, privacy, and personal autonomy? In this case, could the pregnant woman's choice to interrupt the pregnancy be considered a crime? I believe not, Mr. President. This is because, when weighing the legal values protected by law, the unviable extrauterine life and the woman's liberty and personal autonomy, I understand that, in this case, the woman's dignity should prevail. Her right to freedom should prevail, allowing her to choose what best represents her personal interests, moral and religious convictions, and personal feelings.

Justice Marco Aurélio rendered a preliminary decision in the following terms:

Em questão está a dimensão humana que obstaculiza a possibilidade de se coisificar uma pessoa, usando-a como objeto. Conforme ressaltado na inicial, os valores em discussão revestem-se de importância única. A um só tempo, cuida-se do direito à saúde, do direito à liberdade em seu sentido maior, do direito à preservação da autonomia da vontade, da legalidade e, acima de tudo, da dignidade da pessoa humana. O determinismo biológico faz com que a mulher seja a portadora de uma nova vida, sobressaindo o sentimento maternal. São nove meses de acompanhamento, minuto a minuto, de avanços, predominando o amor. A alteração física, estética, é suplantada pela alegria de ter em seu interior a sublime gestação. As percepções se aguçam, elevando a sensibilidade. Este o quadro de uma gestação normal, que direciona a desfecho feliz, ao nascimento da criança. Pois bem, a natureza, entrementes, reserva surpresas, às vezes desagradáveis. Diante de uma deformação irreversível do feto, há de se lançar mão dos avanços médicos tecnológicos, postos à disposição da humanidade não para simples inserção, no dia-a-dia, de sentimentos mórbidos, mas, justamente, para fazê-los cessar. No caso da anencefalia, a ciência médica atua com margem de certeza igual a 100%. Dados merecedores da maior confiança evidenciam que fetos anencefálicos morrem no período intrauterino em mais de 50% dos casos. Quando se chega ao final da gestação, a sobrevida é diminuta, não ultrapassando período que possa ser tido como razoável, sendo nenhuma a chance de afastarem-se, na sobrevida, os efeitos da deficiência. Então, manter-se a gestação resulta em impor à mulher, à respectiva família, danos à integridade moral e psicológica, além dos riscos físicos reconhecidos no âmbito da medicina. Como registrado na inicial, a gestante convive diuturnamente com a triste realidade e a lembrança ininterrupta do feto, dentro de si, que nunca poderá se tornar um ser vivo. Se assim é - e ninguém ousa contestar -, trata-se de situação concreta que foge à glosa própria ao aborto - que conflita com a dignidade

humana, a legalidade, a liberdade e a autonomia de vontade. A saúde, no sentido admitido pela Organização Mundial da Saúde, fica solapada, envolvidos os aspectos físico, mental e social. Daí cumprir o afastamento do quadro, aguardando-se o desfecho, o julgamento de fundo da própria argüição de descumprimento de preceito fundamental, no que idas e vindas do processo acabam por projetar no tempo esdrúxula situação.

Preceitua a lei de regência que a liminar pode conduzir à suspensão de processos em curso, à suspensão da eficácia de decisões judiciais que não hajam sido cobertas pela preclusão maior, considerada a recorribilidade. O poder de cautela é ínsito à jurisdição, no que esta é colocada ao alcance de todos, para afastar lesão a direito ou ameaça de lesão, o que, ante a organicidade do Direito, a demora no desfecho final dos processos, pressupõe atuação imediata. Há, sim, de formalizar-se medida acauteladora e esta não pode ficar limitada a mera suspensão de todo e qualquer procedimento judicial hoje existente. Há de viabilizar, embora de modo precário e efêmero, a concretude maior da Carta da República, presentes os valores em foco. Daí o acolhimento do pleito formulado para, diante da relevância do pedido e do risco de manter-se com plena eficácia o ambiente de desencontros em pronunciamentos judiciais até aqui notados, ter-se não só o sobrestamento dos processos e decisões não transitadas em julgado, como também o reconhecimento do direito constitucional da gestante de submeter-se à operação terapêutica de parto de fetos anencefálicos, a partir de laudo médico atestando a deformidade, a anomalia que atingiu o feto. É como decido na espécie. (Brazil, 2012, no page)

The issue at hand concerns the human dimension that obstructs the possibility of objectifying a person, using them as an object. As highlighted in the claim, the

values being discussed are of unique importance. At the same time, it addresses the right to health, the right to freedom in its broadest sense, the right to preserve the autonomy of will, legality, and, above all, human dignity. Biological determinism makes the woman the bearer of a new life, with the maternal feeling standing out. For nine months, the woman experiences constant monitoring, minute by minute, of progress, dominated by love. The physical, aesthetic changes are surpassed by the joy of having the sublime pregnancy within her. Perceptions are heightened, increasing sensitivity. This is the situation of a normal pregnancy, which leads to a happy conclusion, the birth of the child. However, nature sometimes reserves unpleasant surprises. In the face of an irreversible fetal deformation, medical technological advancements should be employed, not to simply introduce morbid feelings into everyday life, but precisely to bring them to an end. In the case of anencephaly, medical science operates with 100% certainty. Reliable data shows that anencephalic fetuses die in utero in over 50% of cases. By the end of the pregnancy, the chance of survival is minimal, not exceeding a reasonable period, and there is no chance that the effects of the disability can be avoided after birth. Therefore, continuing the pregnancy results in imposing moral and psychological harm on the woman and her family, in addition to the physical risks recognized by the medical field. As stated in the initial petition, the pregnant woman lives daily with the sad reality and the unbroken reminder of the fetus within her, which will never become a living being. If this is the case – and no one dares contest it – it is a concrete situation that escapes the legal definition of abortion, which conflicts with human dignity, legality,

> freedom, and autonomy of will. Health, as defined by the World Health Organization, is undermined, involving physical, mental, and social aspects. Hence, it is necessary to remove the situation and await the final judgment of the fundamental precept violation claim, as the delays in the proceedings have prolonged the absurd situation.
>
> The applicable law stipulates that a preliminary injunction may lead to the suspension of ongoing processes, or the suspension of the effectiveness of judicial decisions that have not been covered by greater preclusion, considering the possibility of appeal. The power of precaution is inherent in jurisdiction, which is made accessible to everyone to prevent harm to a right or the threat of such harm. Given the organic nature of the law, the delay in the final conclusion of processes requires immediate action. There must indeed be a formal precautionary measure, and this cannot be limited to merely suspending any existing judicial procedure. It must make possible, albeit in a precarious and temporary manner, the greater concretization of the Constitution, with the values at stake being present. Hence, the request is granted in recognition of the importance of the claim and the risk of maintaining the full effectiveness of the environment of judicial discrepancies noted so far. Not only should the processes and decisions that have not been finalized be suspended, but also the constitutional right of the pregnant woman to undergo the therapeutic procedure of delivering anencephalic fetuses, based on a medical report certifying the deformity, the anomaly that affected the fetus. This is how I decide in this case.

The ADPF 54 was ultimately ruled on the merits. Although it addresses the decriminalization limited to a specific indication

(anencephaly) — and much was said about it not being strictly an abortion, but rather a therapeutic anticipation of childbirth, since there would be no life to protect — the interpretation in line with the Constitution, which was requested, closely resembles that of the Claim of noncompliance with a fundamental precept (ADPF) 442. The fundamental constitutional rights invoked for the protection of women (freedom, autonomy, equality, health, reproductive rights, family planning) are the same, and now there is also a search for interpretation in accordance with the Constitution through the proposal of the same type of abstract constitutional control.[46]

In ADPF 54, the secularism of the State, the right to life, and their implications in the issue of abortion criminalization were also discussed.

Before analyzing the mentioned correlation, it is interesting to note that the *Conferência Nacional dos Bispos do Brasil* – CNBB [National Conference of Bishops of Brazil] requested to intervene in ADPF 54 as *amicus curiae*, a request that was denied by the rapporteur. It is worth highlighting that, in the already mentioned Habeas Corpus 84.025-6/RJ, the petitioner was a priest who decided to specialize in filing habeas corpus to protect the future right to freedom of movement of the unborn.

The issue, therefore, has sparked strong interest from the religious community, which even defends the continuation of pregnancy in cases of anencephaly – despite knowing that there is no possibility of life for anencephalic fetuses – based on religious convictions and, thus, in blatant disrespect for the freedom of conscience and belief and for the secular state.

The Penal Code, as we can see, remains quite conservative regarding abortion. This is largely due to the influence certain religious sectors still have on lawmakers. The process of secularization of law is far from complete. Religion is still often confused with law. In the case of abortion

due to anencephaly, the debate highlighted this in an exuberant way. There is no serious reason to justify not permitting abortion when it is known that a fetus with anencephaly survives no longer than 10 minutes after birth. In fact, half of them die during gestation, and the other half perish immediately after birth. Death, in any case, is inevitable.

Justice Marco Aurélio said:

> Os que sustentam, (ainda que com muita boa-fé), o respeito à vida do feto, devem atentar para o seguinte: em jogo está a vida ou a qualidade de vida de todas as pessoas envolvidas com o feto mal formado. Se até em caso de estupro, em que o feto está bem formado, nosso Direito autoriza o aborto, nada justifica que idêntica regra não seja estendida para o aborto anencefálico. Lógico que a gestante, por suas convicções religiosas, pode não querer o aborto. Mas isso constitui uma decisão eminentemente pessoal, que deve ser respeitada. De qualquer maneira, não pode impedir o exercício do direito ao abortamento para aquelas que não querem padecer tanto sofrimento.
>
> Observe-se, de outro lado, que a anencefalia não é uma situação excepcionalíssima no nosso país. De cada 10.000 nascimentos, 8,6 apresentam tal anomalia. No Hospital das Clínicas, em São Paulo, todo mês, são 2 ou 3 casos. Isso vem causando muita aflição para as pessoas envolvidas e também para os médicos, que muitas vezes ficam indecisos e perdidos, sem saber o que fazer. Dogma é dogma, Direito é Direito. O processo de secularização do Direito (separação entre Direito e religião) deve ser concluído o mais pronto possível. Resquícios da confusão entre eles devem ser eliminados.
>
> O nascimento de um novo ser humano no planeta deve sempre ser motivo para comemoração, não para decepção. Nascimento é alegria, é vida e isso nada tem a ver com o clima funerário que gera a gestação assim como o nascimento do feto anencefálico.

Praticamente todos os países desenvolvidos já autorizam o aborto por anencefalia (Suíça, Bélgica, Áustria, Itália, Espanha, França etc.). Somente os países em desenvolvimento é que o proíbem (Paraguai, Venezuela, Argentina, Chile, Equador). É chegado o momento de nos posicionarmos em favor do não sofrimento inútil do ser humano. O pior que se pode sugerir (ou impor) no mundo atual é que alguém padeça sofrimentos inúteis. (Brazil, 2012, no page)

Those who advocate (even with good intentions) for respect for the fetus' life must pay attention to the following: what is at stake is the life or quality of life of all the people involved with the malformed fetus. If even in cases of rape, where the fetus is well-formed, our law allows abortion, there is no reason why the same rule should not be extended to anencephalic abortion. It is clear that the pregnant woman, due to her religious beliefs, may not want the abortion. But this is an eminently personal decision, which should be respected. In any case, it cannot prevent the exercise of the right to abortion for those who do not want to endure so much suffering.

On the other hand, it should be noted that anencephaly is not an exceptionally rare situation in our country. For every 10,000 births, 8.6 present such an anomaly. At the *Hospital das Clínicas* in São Paulo, there are 2 or 3 cases every month. This causes a lot of distress for the people involved, and also for the doctors, who are often undecided and lost, not knowing what to do. Dogma is dogma, law is law. The process of secularizing the law (separation between law and religion) should be completed as soon as possible. The remnants of the confusion between them should be eliminated. The birth of a new human being on the planet should always be a

> cause for celebration, not disappointment. Birth is joy, it is life, and this has nothing to do with the funeral-like atmosphere generated by the pregnancy, as well as the birth of the anencephalic fetus.
>
> Practically all developed countries already allow abortion in cases of anencephaly (Switzerland, Belgium, Austria, Italy, Spain, France, etc.). Only developing countries prohibit it (Paraguay, Venezuela, Argentina, Chile, Ecuador). The time has come for us to take a stand in favor of not causing unnecessary human suffering. The worst thing that can be suggested (or imposed) in the current world is that someone endures unnecessary suffering.

Finally, it should be noted that respecting freedom of belief and conscience and maintaining a secular state means allowing religious convictions to be respected on an individual, personal level. The moral and religious convictions of a group cannot be adopted by the state, as this would violate democracy itself, pluralism, and the equal legal respect for differences.

The secular state cannot force a woman to undergo a therapeutic abortion in cases of anencephaly, respecting her religious, moral, philosophical beliefs, and convictions. It also cannot prohibit those who wish to undergo such procedures, respecting their own beliefs and convictions that lead them to desire the therapeutic abortion. In short, the secular state must guarantee freedom of belief and conscience for all.

Thus, ADPF 54 constitutes an important precedent in the discussion of expanding the hypotheses for abortion in Brazil, even though one may argue that, in this case, the right to life of the fetus was not compromised due to the total impossibility of life for an anencephalic fetus. However, it should be emphasized that the ruling of ADPF 54 in 2012 allowed for the inclusion of a new possibility for legal abortion

and opened the door for public debates about the fundamental constitutional rights of women linked to the abortion debate.

Having completed the analysis of the hypotheses in which abortion is allowed, i.e., the legal abortion hypotheses (primary criminalization), it is now necessary to analyze how the law is being enforced, specifically in terms of the actual application of criminal law in relation to the practice of abortion—how the secondary criminalization of abortion has been carried out.

3.3 THE SECONDARY CRIMINALIZATION OF ABORTION: PENAL SELECTIVITY OF POOR, BLACK AND LOW-EDUCATED WOMEN

In the abortion debate, one key question that needs to be addressed is whether secondary criminalization — carried out by agents responsible for enforcing the law — is effective when it comes to the crime of abortion. The research hypothesis was that, although abortion is considered a crime under the Penal Code (primary criminalization), secondary criminalization is weak and not effectively enforced by the justice system. The circumstances under which abortions occur, their clandestinity and secrecy, as well as the difficulties in proving that the abortion was indeed induced or that the method used by the pregnant woman caused the death of the fetus (through expert testimony and forensic reports), or even finding witnesses to the events, result in numerous investigations being shelved.

Additionally, primary criminalization allows for the conditional stay of proceedings due to the minimum penalty applied to women with no criminal history or good records. While a particular act may

be considered a crime in common sense, it implies a real possibility of imprisonment and being sentenced to serve time in prison. In the case of abortion, this almost never happens due to the challenges mentioned above and the possibilities provided by the very model of criminalization in place. These characteristics are often cited by those who defend criminalization as an argument to downplay the fact that abortion is criminalized in Brazil.

In other words, abortion is a crime, but women are rarely imprisoned for it, so there is no reason to decriminalize it. They argue that criminalization is not as severe as it seems. This perspective overlooks the deaths or health complications that unsafe abortions can cause, the criminal records that further hinder women's access to the job market, and the social stigma associated with being criminally prosecuted for abortion, especially when the prevailing social and cultural norm assigns women the role of mother and caregiver.

Ferreira (2013, p. 262) points out that, although abortion by a woman's free choice is a crime, this criminalization does not translate into an intense judicial process of the cases. In her article, she analyzes a widely publicized case from 2007 involving a clinic in Mato Grosso, where abortions were being performed. This investigation led to the prosecution of approximately 1,200 women who had visited the clinic in recent years. The author interviewed several women who had been prosecuted to understand how the process impacted their lives, as well as the legal authorities involved in the justice system.

One of Ferreira's (2013) key findings was that both from the perspective of the accused women and the authorities interviewed, these women were not considered criminals. The accounts indicated that, in these women's lives, the act of committing the crime was an exception. The author observed the significant impact a public trial had on these women's lives, as abortion is typically clandestine, and secrecy is emphasized.

Many women, during their testimony, felt coerced into stating that they regretted having the abortion or even into confessing the act.

When discussing what they call gender-specific criminal offenses (abortion, infanticide, and abandonment of a vulnerable person), Borges and Coelho Netto (2013, p. 330 and 333) note that one of their particularities is:

> O fato bastante relevante de os três crimes terem baixíssima aplicabilidade no âmbito da execução penal, ou seja, na maioria das vezes estas práticas não recebem punição formal, ou institucionalizada na forma do poder judiciário.
> [...]
> Além disso, pode-se comprovar ao se fazer uma breve análise processual penal que o processo contra quem comete aborto é apenas formalidade, já que em raríssimos casos uma mulher será reclusa por conta desta prática.

> The significant fact is that these three crimes (abortion, infanticide, and abandonment of a vulnerable person) have very low applicability within the scope of criminal enforcement, meaning that, in most cases, these acts do not receive formal or institutionalized punishment in the form of judicial power.
> [...]
> Additionally, a brief analysis of criminal procedural law shows that the legal process against those who commit abortion is often just a formality, as in rare cases will a woman be incarcerated due to this practice.

The authors explain that when a police inquiry is initiated to investigate the crime of abortion, evidence must be collected to

show that the woman either provoked an abortion or allowed to it be performed on herself. A fetal autopsy will be necessary. Here, the first issues arise, as it is difficult to gather concrete evidence since abortions are typically carried out in secrecy, at home, or in illegal clinics. Furthermore, if the fetus is found, the examination must prove a causal link between the fetus's death and the actions of the woman or third parties. If all of this occurs, it must still be sufficient to convince the Public Prosecutor to file charges, and even then, they may request an acquittal depending on the evidence presented during the investigation. In cases of abortion, the conditional discontinuation of criminal prosecution is possible under Law No. 9,099/1995, which, if accepted by the woman, will lead to the case dismissal after a period if certain conditions are fulfilled. If the woman is judged by the Jury Court with a maximum sentence of three years, she may serve her sentence in open prison.

In analyzing secondary criminalization, it is important to understand who the women prosecuted for abortion actually are. While some research exists on this topic, it does not fully reflect the magnitude of abortion in Brazil, as studies that focus on women prosecuted for abortion only capture those cases where the abortion went wrong, caused complications, and was discovered. These typically involve abortions performed under poor conditions, at a slightly more advanced stage of pregnancy, by black, poor women with low education who cannot afford a safe abortion performed by doctors in well-equipped medical facilities.

These more vulnerable women are the ones who end up being selected by the criminalization of abortion in Brazil. Gonçalves and Rosendo (2015, p. 306) highlight that even in the case of legal abortion, women in Brazil face exceptional difficulty accessing this service, whether in urban or rural areas. This situation exposes them to sexual and reproductive health risks — often endangering their

lives — especially for low-income women, creating inequality even among women themselves.

A recent study conducted by the *Defensoria Pública do Estado do Rio de Janeiro* [Public Defender's Office of the State of Rio de Janeiro] (2018) analyzed 55 criminal abortion cases in the state of Rio de Janeiro from a universe of 75 cases, which were revealed after data was provided by the Rio de Janeiro Court of Justice. The cases included articles 124, 125, and 126, which were distributed between 2005 and 2017. An interesting finding from this research is that some of these cases referred to abortions that occurred in clandestine clinics discovered through police investigation. The study revealed certain distinctions between the profiles of women who perform abortions on their own versus those who seek out clinics.

The research indicated that women who perform abortions outside of clinics typically ingest the medication "cytotec" or use abortive teas. In general, the denunciations were made by the hospitals the women sought after experiencing bleeding, pain, or other symptoms, or by family members who didn't know how to deal with the fetus or who asked for help to assist the woman who was aborting at home. In one case, the duty officer at the hospital was called while the woman was being treated and identified themselves as a social worker to obtain the defendant's confession. In the majority of cases, 60% of the women were Black, and 65% had children. Only three women had a pregnancy under 12 weeks (16.6% of the cases with information from a total of 83.3%).

Regarding these women, the research observes:

> A situação dessas mulheres é de extrema vulnerabilidade, pois, como regra, elas recorrem ao atendimento médico porque se sentiram muito mal em casa, vindo a abortar, muitas vezes, no local

> onde foram atendidas. Constatou-se que é comum que a mulher se demore a decidir pelo aborto por medo de ser descoberta, realizando o procedimento com a gravidez já em estágio avançado, sofrendo de forma mais drástica os efeitos do procedimento de interrupção da gestação. Notou-se também que muitas abortam no banheiro do hospital e são hostilizadas pelos médicos e enfermeiros que deveriam auxiliá-la a entender o que ocorreu. (Defensoria Pública do Estado do Rio de Janeiro, 2018, p. 10)

> The situation of these women is one of extreme vulnerability because, as a rule, they seek medical care only after feeling very ill at home, often ending up aborting at the location where they sought help. It was found that it is common for women to delay their decision to have an abortion out of fear of being discovered, and as a result, they often undergo the procedure when the pregnancy is already at an advanced stage, experiencing more severe effects from the pregnancy termination procedure. It was also noted that many women abort in the hospital bathroom and are met with hostility from the doctors and nurses who should be assisting them in understanding what has occurred.

Regarding the women who sought a clinic to perform the abortion, the research found that:

> O perfil da mulher que vai até uma clínica particular realizar o procedimento de interrupção da gravidez é diferente do perfil da mulher que se vale de outros métodos, como a ingestão de medicamentos e chás abortivos, especialmente no que diz respeito ao tempo de gravidez. Em todos os casos em que se tem informação, a gestão estava abaixo de 12 semanas, o

> que indica que a mulher que pode pagar pelo procedimento, consegue tomar a decisão com mais rapidez. (Defensoria Pública do Estado do Rio de Janeiro, 2018, p. 13)

> The profile of the woman who goes to a private clinic to undergo the abortion procedure is different from the profile of the woman who resorts to other methods, such as ingesting medications and abortive teas, particularly regarding the duration of the pregnancy. In all cases where information is available, the pregnancy was under 12 weeks, indicating that a woman who can afford the procedure is able to make the decision more quickly.

These women were mostly white and had higher levels of education. In 19 cases, it was possible to confirm that the amount paid ranged from R$ 600.00 to R$ 4,500.00. Despite the risky situation in which they undergo procedures — because they can almost never ask how it will be performed and often have to attend without accompaniment or a cellphone, in addition to the risk of being caught by the police — these women are in a better position, as it is more common for a doctor to be involved, and they make the decision much earlier, with the pregnancy in its initial stage.

Santos (1978, p. 22) highlights that:

> A experiência histórica parece demonstrar que o custo social indireto de uma política restritiva é muito mais significativo do que o de uma política permissiva, nos limites das indicações terapêuticas e humanitárias, em condições hospitalares adequadas, e mediante o controle da necessidade (ou conveniência). Em uma sociedade de classes, edificada sobre a exploração e a miséria, essas medidas estão muito distantes das questões centrais de formação social, mas tem a sua importância:

o aborto ilegal afeta, principalmente, as mulheres das classes depossuídas e mais exploradas da população.

Historical experience seems to demonstrate that the indirect social cost of a restrictive policy is far more significant than that of a permissive policy, within the limits of therapeutic and humanitarian indications, in proper hospital conditions, and with the control of necessity (or convenience). In a class society, built on exploitation and poverty, these measures are very distant from the central issues of social formation, but they hold importance: illegal abortion primarily affects women from the most deprived and exploited classes of the population.

The Public Defender's Office of the State of São Paulo filed 30 Habeas Corpus with the São Paulo State Court of Justice in September 2017, on behalf of women who had undergone abortions – based on data provided by the court itself. These cases were selected after a request for data on ongoing abortion cases was made directly to the court by the Specialized Nucleus for the Promotion and Defense of Women's Rights.

The habeas corpus petitions were filed only for women accused under Article 124 of the Penal Code. The initial list contained 55 cases, which were reduced to 30, where filing the constitutional guarantee was still possible.

An analysis of these cases was conducted to establish a profile of the women prosecuted for abortion, as well as the circumstances in which the abortion took place and the outcomes of their cases. This analysis aimed to examine the secondary criminalization of women who undergo abortion: *O perfil dessas mulheres é, assim, bastante claro: são jovens em*

idade reprodutiva, já são mães e as principais responsáveis pelo sustento da casa, são pouco educadas e pobres. São primárias. Não são criminosas [The profile of these women is thus quite clear: they are young, of reproductive age, already mothers, and the main breadwinners of their households. They are poorly educated and poor. They are primary. They are not criminals]. (Defensoria Pública do Estado de São Paulo, 2018, p. 8).

According to the survey, the women were incriminated based on reports from healthcare professionals who attended to them in SUS (public health system) facilities, which occurred in 56.6% of the cases. In 70% of the cases, there was a breach of professional confidentiality in the analyzed processes. In 30 cases reviewed, 20 hospitals provided medical documents for the patients accused of committing the crime. Only one hospital indicated it would not provide the documents due to ethical confidentiality duties. The most commonly used method in these cases was the "cytotec" pill, which was used in 21 cases. In the cases analyzed, the abortion occurred between December 2003 and December 2016.

In 19 of the cases, the women were serving a conditional suspension of the proceedings, which involved various restrictions on their freedom, such as a prohibition on visiting certain places, not being allowed to travel for more than eight days without judicial authorization, having to inform the Judiciary about address changes, performing community service, and attending court regularly to report on their activities. Of the habeas corpus petitions filed, 83% were not granted. It was argued that the abortion crime was atypical, that there was no valid cause due to the illegal nature of the evidence, and that there was no criminal materiality:

> A falta de materialidade também é de fácil percepção, havendo ações penais sem nenhuma prova de gestação e de

> abortamento, ações penais em que o método utilizado para provocar sequer foi mencionado, e diversas ações penais em que não há prova de causalidade. Ainda assim, a polícia e Ministério Público insistem nos processos de criminalização. (Defensoria Pública do Estado de São Paulo , 2018, no page)

> The lack of materiality is also easily noticeable, with criminal actions lacking any proof of pregnancy or abortion, cases where the method used to provoke the abortion was not even mentioned, and numerous cases with no proof of causality. Still, the police and Public Prosecutor's Office insist on pursuing criminalization processes.

Few studies address the behavior of the Judiciary regarding abortion in Brazil, as noted by Gonçalves and Lapa (2010), who identified 781 cases from the research named *Aborto e Religião nos Tribunais Brasileiros*, covering the period from 2001 to 2006. The research focused on the Superior Courts and State Courts, based on the keyword "abortion" found on the respective websites of these courts. During that period, the authors found 130 cases involving clandestine abortions, primarily involving the criminalization of third parties (Articles 125 and 126 of the Penal Code), and 50 cases of self-induced abortions (Article 124): "It is noted that these criminalized abortions are generally procedures in which complications (such as hemorrhages) occurred, leading the woman to seek public healthcare services, revealing the occurrence of the abortion" (Gonçalves & Lapa, 2010, p. 55).

Another study analyzing cases of women prosecuted for abortion in the state of Rio de Janeiro from 2012, also based on data provided by the Rio de Janeiro Court of Justice regarding criminal cases between 2006 and 2010, shows that the incidence of women prosecuted is not

marginal but occurs more often when clinics performing abortions are investigated and discovered:

> Isso nos faz pensar em dois elementos: o primeiro é que a entrada destas mulheres dependeria muito mais de políticas do executivo (políticas de segurança), que são sazonais e localizadas. Tais políticas não necessariamente atingem toda a cidade ou todo o estado ao mesmo tempo. O segundo elemento foi o reforçado por um dos entrevistados, que chegou a dizer que se fazia nos Tribunais do Júri, uma espécie de "legalização informal do aborto", pois seria comum o oferecimento da suspensão condicional do processo, instrumento jurídico que interrompe o processamento da ação e a produção de provas. Dessa forma, não ocorre a análise do mérito da questão, não se determinando se há autoria e materialidade na conduta a ser imputada como criminosa. (Cunha, Noronha & Vestena, 2012, p. 217)

> This makes us consider two elements: the first is that the involvement of these women would depend much more on executive policies (security policies), which are seasonal and localized. Such policies do not necessarily affect the entire city or state at the same time. The second element was emphasized by one of the interviewees, who stated that, in the Jury Courts, there was a kind of "informal legalization of abortion," as it was common for the conditional suspension of the process to be offered, a legal instrument that interrupts the processing of the case and the production of evidence. In this way, the merits of the issue are not analyzed, and it is not determined whether there is authorship and materiality in the conduct to be attributed as criminal.

In the final report of the research *Mulheres Incriminadas por aborto no RJ: diagnóstico a partir dos atores do sistema de justiça* (Cunha, Noronha & Vestena, 2017) state that, by comparing their study with the National Abortion Survey (Diniz & Medeiros, 2010), they arrived at the important insight about the justice system. On one hand, there is a general set of information about women who have had abortions, with a broad profile, as women from various social groups reported having had an abortion; on the other hand, there is a specific context, the subset of women who aborted and were introduced into the justice system. This subset is not a symmetrical representation of the total group, meaning it presents profile differences. That is, from the entire universe of women who have abortions, only some — younger, unemployed or in informal situations, Black, with low education, living in peripheral areas — were captured by the system.

This same research showed that health professionals or military police officers (on duty at public health clinics) are the ones who go to court, meaning it is much more common for a woman to be incriminated for abortion when she uses a "homemade" abortive method (medications obtained on the black market and other methods) than when she resorts to a clinic.

Therefore, it is observed that, in the universe of women who are prosecuted for abortion, the reports often come from healthcare professionals who attended them, in clear violation of medical confidentiality, which should be preserved to ensure that healthcare is provided safely and without fear. However, experiencing a complication from an unsafe abortion and needing to seek health services can mean, for these women, being arrested and prosecuted[47].

The opposite of what is recommended by the Ministry of Health occurs when it calls for humanized care for abortion, through the *Norma Técnica do Ministério da Saúde sobre Atenção Humanizada*

ao Abortamento [Technical Standard of the Ministry of Health on Humanized Care for Abortion] (Brazil, 2005, p. 17):

> Quando as mulheres chegam aos serviços de saúde em processo de abortamento, sua experiência é física, emocional e social. Geralmente, elas verbalizam as queixas físicas, demandando solução, e calam-se sobre suas vivências e sentimentos. A mulher que chega ao serviço de saúde abortando está passando por um momento difícil e pode ter sentimentos de solidão, angústia, ansiedade, culpa, autocensura, medo de falar, de ser punida, de ser humilhada, sensação de incapacidade de engravidar novamente. Todos esses sentimentos se misturam no momento da decisão pela interrupção, sendo que para a maioria das mulheres, no momento do pós-abortamento, sobressai o sentimento de alívio. O acolhimento e a orientação são elementos importantes para uma atenção de qualidade e humanizada às mulheres em situação de abortamento. Acolher, segundo o dicionário Aurélio é: "dar acolhida a, atender, dar crédito a, dar ouvidos a, admitir, aceitar, tomar em consideração". Pode também ser definido como "receber bem, ouvir a demanda, buscar formas de compreendê-la e solidarizar-se com ela" (Paidéia, 2002).

> When women arrive at healthcare services in the process of abortion, their experience is physical, emotional, and social. They typically verbalize their physical complaints, seeking a solution, while remaining silent about their experiences and feelings. The woman who arrives at the healthcare service undergoing an abortion is going through a difficult time and may feel loneliness, anguish, anxiety, guilt, self-censorship, fear of speaking out, fear of being punished or humiliated, and a sense of inability to conceive again. All these feelings mix at the moment of the decision to terminate the

pregnancy, with relief being the predominant feeling for most women in the post-abortion period. Reception and guidance are crucial elements for providing quality, humanized care to women in the abortion situation. To receive, according to the Aurélio dictionary, means: "to welcome, attend to, give credit to, listen to, admit, accept, consider." It can also be defined as "to receive well, listen to the demand, seek ways to understand it, and show solidarity with it".

The *Norma Técnica do Ministério da Saúde sobre Atenção Humanizada ao Abortamento*, when addressing professional confidentiality in cases of abortion, recommends that healthcare professionals:

> Diante de abortamento espontâneo ou provocado, o(a) médico(a) ou qualquer profissional de saúde não pode comunicar o fato à autoridade policial, judicial, nem ao Ministério Público, pois o sigilo na prática profissional da assistência à saúde é dever legal e ético, salvo para proteção da usuária e com o seu consentimento. O não cumprimento da norma legal pode ensejar procedimento criminal, civil e ético profissional contra quem revelou a informação, respondendo por todos os danos causados à mulher. (Brazil, 2005, p. 14).

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in the case of spontaneous or induced abortion, the doctor or any healthcare professional cannot report the event to the police, judiciary, or the public prosecutor's office, as confidentiality in professional healthcare practice is a legal and ethical duty, except for the protection of the patient and with her consent. failure to comply with this legal standard may result in criminal, civil, and professional ethical proceedings against the person who

DISCLOSED THE INFORMATION, HOLDING THEM ACCOUNTABLE FOR ANY HARM CAUSED TO THE WOMAN.

It also explains that, regarding a minor patient:

> **Código de Ética Médica**: "é vedado ao médico revelar segredo profissional referente a paciente menor de idade, inclusive a seus pais ou responsáveis legais, desde que o adolescente tenha capacidade de avaliar seu problema e de conduzir-se por seus próprios meios para solucioná-los, salvo quando a não revelação possa acarretar danos ao paciente" (art. 103).
> [...]
> A assistência à saúde da menor de 18 anos em abortamento deve, pois, submeter-se ao princípio da proteção integral. Se a revelação for feita para preservá-la de danos, estaria afastado o crime de revelação de segredo profissional. Entretanto, a revelação do fato também pode lhe acarretar prejuízos ainda mais graves, como o seu afastamento do serviço de saúde e perda da confiança nos profissionais que a assistem. A decisão, qualquer que seja, deve estar justificada no prontuário da adolescente. (Brazil, 2005a, p. 14-15, emphasis added)

> **Medical Ethics Code:** "It is prohibited for the doctor to reveal professional secrets related to a minor patient, including to their parents or legal guardians, as long as the adolescent has the ability to assess their problem and navigate through their own means to solve it, except when non-revelation could cause harm to the patient" (art. 103).
> [...]
> Assistance to a minor under 18 years old in abortion cases must, therefore, adhere to the principle of full

> protection. If the disclosure is made to protect her from harm, the crime of revealing professional secrets would not apply. However, the revelation of the fact could also cause even more serious harm, such as her removal from health services and loss of trust in the professionals assisting her. The decision, whatever it may be, must be justified in the adolescent's medical record.

In 2017, the *Núcleo de Promoção e Defesa dos Direitos da Mulher* – Nudem [Women's Rights Promotion and Defense Center] of the Public Defender's Office of the State of São Paulo filed 30 Habeas Corpus in abortion cases.[48] One of the legal arguments used was the inadmissibility of evidence obtained through the violation of medical confidentiality.

The violation of medical confidentiality in abortion cases, observed in many of the cases, remains common. Medical records are frequently requested and obtained by police officers, prosecutors, and judges. The most affected by this practice are low-income women, who face not only criminalization but also health risks associated with undergoing illegal abortions. Many decisions made by the São Paulo Court of Justice have endorsed the breach of medical confidentiality:

> O enfermeiro, responsável por seu atendimento, percebeu indícios de um aborto provocado, razão pela qual compareceu à Delegacia de Polícia e comunicou o fato à autoridade policial. Outrossim, não se reconhece ilicitude de provas em função da alegada afronta ao direito à intimidade e ao dever de sigilo profissional.
>
> É que esse direito fundamental não é absoluto. Aliás, é de rigor a ponderação deste em relação às demais garantias constitucionais. Assim, e embora nesta feita não se expresse juízo terminante acerca do mérito, não se pode coartar a apuração de conduta prevista como crime doloso, especialmente como o ora imputado

(contra a vida), para assegurar o direito à inviolabilidade da intimidade (artigo 5º, X, da Constituição da República) ou dever de sigilo profissional (artigo 154 do Código Penal). (*Habeas Corpus* nº 2188893-48.2017.8.26.0000, da Comarca de Apiaí, Rel. Des. Encinas Manfré, j. 07/12/2017). (São Paulo, 2017b, no page)

O que também se mostra imprescindível no que se refere à suposta quebra de sigilo profissional, porquanto, neste último aspecto, é sabido que "o sigilo profissional não é absoluto, contém exceções, conforme depreende-se da leitura dos respectivos dispositivos do Código de Ética" (STJ, RMS 11453/SP, Relator Min. José Arnaldo da Fonseca, j. 17/06/2003). (*Habeas Corpus* nº 2188913-39.2017.8.26.0000, da Comarca de Birigüi, Rel. Des. Sergio Coelho, j. 09/11/2017). (São Paulo, 2017g. no page)

Conforme boletim de ocorrência de fls. 36/37, o médico plantonista que atendeu JACKELINE narrou que ela esclareceu que estava grávida de aproximadamente quatro meses e, visando interromper a gestação, fez uso do referido medicamento. Contudo, teve sangramento, daí porque procurou atendimento médico. Prosseguiu relatando que foi solicitada sua internação junto à Santa Casa local, mas os responsáveis alegaram que somente aceitariam a paciente caso o boletim de ocorrência fosse lavrado, daí porque comunicou os fatos à autoridade policial. No que tange à alegação de ausência de justa causa para a propositura da ação penal, face à ilicitude dos elementos de prova, aduzindo a afronta ao direito à intimidade pela violação do sigilo profissional por meio da *notitia criminis* apresentada contra a paciente, também não merece guarida. A uma porque questões atinentes à conduta do médico devem ser analisadas durante a instrução criminal.
A duas porque não se pode, diante de tal fato, obstar o dever do Estado em investigar condutas que infrinjam disposto no ordenamento jurídico.

A três porque o indivíduo, quando inserido em sociedade, não dispõe de liberdade absoluta, devendo submeter-se às regras entabuladas e, caso não haja sua realização, estará sujeito à persecução criminal e, se restar provado o cometimento do delito, ser-lhe-á imposta determinada pena. Assim, evidente que quaisquer direitos devem ser balizados e ponderados, daí porque não se há falar em acolhimento absoluto de um, em detrimento do outro e, no caso em tela, é certo que a prova indica que houve a prática do aborto, havendo assim lastro probatório para oferecimento da denúncia, tal como ocorreu. Habeas Corpus nº 2188901-25.2017.8.26.0000, da Comarca de Batatais, Rel. Des. Carlos Monnerat, j. 07/12/2017). (São Paulo, 2017h, no page)

Entretanto, o laudo pericial acostado aos autos foi realizado de forma indireta, com base na ficha de atendimento ambulatorial do Pronto Socorro da Santa Casa de Misericórdia de Guararema, a qual, por sua vez, refere-se ao aborto como mera "hipótese diagnóstica", decorrente, ao que consta, do próprio relato da paciente, sem mencionar, entretanto, quaisquer exames que tenham levado à confirmação da hipótese diagnóstica preliminar. (Habeas Corpus nº 2188911-69.2017.8.26.0000, da Comarca de Guararema, Rel. Des. Leme Garcia, j. 24/10/2017). (São Paulo, 2017i, no page)

4. Violação do "dever de sigilo médico" x prova ilícita. Inexistência. Relativização. Isto porque, não se pode, em nenhum caso, permitir que o direito fundamental à inviolabilidade da intimidade privada (violação ao dever do sigilo médico) sirva como salvo conduto para impedir a exata apuração de um fato delituoso. A uma, porque embora o dever de "sigilo médico" seja obrigatório, sob pena de tipificação do crime previsto no art. 154, do Código Penal ("revelar alguém, sem justa causa, segredo, de que tem ciência em razão de função, ministério, ofício ou profissão, e cuja revelação possa produzir dano a outrem") e de

violação ao princípio constitucional da intimidade (art. 5º, X, da Constituição Federal), relembro que ele não é nem pode ser visto como absoluto. Inteligência da doutrina de Nelson Hungria e Konrad Hesse. Precedente do STF (MS 23.452/RJ Rel. Min. Celso de Mello Tribunal Pleno j. 16.09.1999 DJe 12.05.2000). A duas, porque somente em um sentido de consciência profissional arraigado a preconceitos de classe já ultrapassados e de equívoca noção de ética médica é que se poderia considerar como "ilícita" prova decorrente de "notitia criminis" oriunda de comunicação realizada pelo médico que atendeu o paciente, aqui a paciente, ainda mais porque se trata de apuração de fato criminoso de amplo conhecimento pela sociedade. Até porque, a deontologia médica não tem seus princípios feridos com a solução imposta pela ordem judicial, principalmente porque, no cotejo do bem jurídico particular tutelado e o superior interesse social, a proteção deste último deve prevalecer, tanto mais que o primeiro, no caso, é disponível! Inteligência da doutrina de José Duarte. A três, porque embora se saiba que os preceitos do Código de Ética Médica, elaborado pelo Conselho Federal de Medicina, sejam de obediência obrigatória pelos médicos, destaco que por se tratar de Resolução (Resolução n. 1.931, de 17 de setembro de 2009, do Conselho Federal de Medicina), nunca prevalecerá sobre as normas legais e jurídicas de maior relevância, que tutelam interesses superiores da coletividade, especialmente os da Justiça Criminal, como no caso em tela, onde há um conflito entre diversos direitos e princípios. Precedente do STF. (RE 91.218/SP Rel. Min. Djaci Falcão Voto Min. Cordeiro Guerra 2ª T j. 10.11.1981 DJe 16.04.1982)

Até porque, no caso em tela, não me parece, nem de perto nem de longe, que haveria violação ao direito à intimidade pela violação do sigilo profissional através da "notitia criminis" apresentada pelo médico contra a paciente (o que, sob o ponto de vista da defesa, tornaria a prova ilícita). Isto porque, não

se pode, em nenhum caso, permitir que o direito fundamental à inviolabilidade da intimidade privada (violação ao dever de sigilo médico) sirva como salvo conduto para impedir a exata apuração de um fato delituoso. (Habeas Corpus nº 2188894-33.2017.8.26.0000, da Comarca de Hortolândia, rel. Des. Airton Vieira, j. 24/10/2017). (São Paulo, 2017c, no page)

Isto porque o direito à intimidade e o dever de sigilo profissional não são absolutos, devendo ser ponderados com as demais normas que integram o ordenamento jurídico, não podendo prevalecer sobre o interesse público na apuração de fato tipificado como crime. (Habeas Corpus nº 2188904-77.2017.8.26.0000, da Comarca de Jaú, Rel. Des. Diniz Fernando, j. 05/02/2018). (São Paulo, 2018a, no page)

The nurse responsible for the patient's care noticed signs of an induced abortion, which led the nurse to go to the Police Department and report the matter to the authorities.
Moreover, the illegality of evidence due to the alleged violation of privacy and the duty of professional confidentiality is not recognized. This fundamental right is not absolute. Indeed, it is crucial to weigh it against other constitutional guarantees. Therefore, although the case does not conclude on the merits, the investigation of a criminal act, especially one against life, cannot be hindered to safeguard the right to privacy (Article 5, X, of the Brazilian Constitution) or the duty of medical confidentiality (Article 154 of the Penal Code). (Habeas Corpus No. 2188893-48.2017.8.26.0000, from Apiaí, Rapporteur Justice Encinas Manfré, j. 07/12/2017). (São Paulo, 2017b, no page).

It is also essential regarding the supposed breach of professional confidentiality, as it is known that "professional confidentiality is not absolute and contains exceptions, as derived from the reading of the respective provisions in the Code of Ethics" (STJ, RMS 11453/SP, Rapporteur Min. José Arnaldo da Fonseca, j. 17/06/2003). (Habeas Corpus No. 2188913-39.2017.8.26.0000, from Birigüi, Relator Des. Sergio Coelho, j. 09/11/2017). (São Paulo, 2017g, no page).

According to the incident report on pages 36/37, the attending doctor who treated JACKELINE reported that she had clarified that she was about four months pregnant and had used the mentioned medication to terminate the pregnancy. However, she experienced bleeding, which led her to seek medical attention. The doctor continued by stating that she was asked to be admitted to the local Santa Casa, but the staff insisted that the patient could only be accepted if a police report was filed, which is why the incident was reported to the authorities. Regarding the claim of lack of grounds for initiating criminal proceedings due to the illegality of evidence, alleging violation of privacy due to the breach of professional confidentiality in the crime notification, it also does not hold. First, the doctor's conduct should be assessed during the criminal investigation. Second, the state's duty to investigate actions that violate the legal framework cannot be impeded. Third, when an individual is part of society, they do not possess absolute freedom, and must adhere to the rules set forth, submitting themselves to criminal prosecution if necessary. If the crime is proven, appropriate punishment will follow. Thus, rights must be balanced and weighed. In this case, it is clear that evidence

indicates an abortion was performed, thus justifying the filing of charges, as occurred. (Habeas Corpus No. 2188901-25.2017.8.26.0000, from Batatais, Relator Des. Carlos Monnerat, j. 07/12/2017). (São Paulo, 2017h, no page).

However, the expert report attached to the case was performed indirectly, based on the outpatient medical record from the Emergency Room at the Santa Casa de Misericórdia de Guararema. This record referred to the abortion as a mere "diagnostic hypothesis," based on the patient's own report, but no tests confirming the preliminary diagnosis were mentioned. (Habeas Corpus No. 2188911-69.2017.8.26.0000, from Guararema, Relator Des. Leme Garcia, j. 24/10/2017). (São Paulo, 2017i, no page).

4. Violation of the "duty of medical confidentiality" vs. inadmissible evidence. No existence of illegality. Relativization. This is because, in no case, should the fundamental right to privacy (breach of medical confidentiality) be used as an excuse to prevent the accurate investigation of a criminal fact. First, although the duty of "medical confidentiality" is mandatory under penalty of criminal liability under Article 154 of the Penal Code ("revealing, without just cause, a secret learned by virtue of function, ministry, office, or profession, where such revelation may harm others") and violation of the constitutional right to privacy (Article 5, X, of the Federal Constitution), it is important to remember that it is not and cannot be seen as absolute. According to the doctrine of Nelson Hungria and Konrad Hesse. Precedent of the STF (MS 23.452/RJ, Rel. Min. Celso de Mello, Plenary session, j. 16.09.1999, DJe 12.05.2000). Second, only with a deeply ingrained class prejudice and a flawed notion of

medical ethics could one consider the evidence as "illicit," derived from a "notitia criminis" communicated by the doctor who attended the patient, especially because this involves the investigation of a criminal act well known by society. After all, medical ethics are not harmed by the judicial order, primarily because the protection of the social interest in criminal justice must prevail over private interests, especially when the latter is available. According to the doctrine of José Duarte. Third, although the provisions of the Medical Code of Ethics, developed by the Federal Medical Council, must be strictly followed by doctors, it is important to highlight that this resolution (Resolution No. 1,931, of 17 September 2009, from the Federal Medical Council) will never supersede more relevant legal norms that protect superior collective interests, particularly those of Criminal Justice, as in this case, where there is a conflict between various rights and principles. Precedent of the STF (RE 91.218/SP, Rapporteur Justice. Djaci Falcão, Vote Justice. Cordeiro Guerra, 2nd Chamber, j. 10.11.1981, DJe 16.04.1982).

Furthermore, in this case, it does not seem to me that there was a violation of the right to privacy through the breach of professional confidentiality in the "notitia criminis" presented by the doctor against the patient (which, from the defense's perspective, would render the evidence inadmissible). This is because, in no case, should the fundamental right to privacy (breach of medical confidentiality) be used as an excuse to prevent the accurate investigation of a criminal fact. (Habeas Corpus No. 2188894-33.2017.8.26.0000, from Hortolândia, Relator Des. Airton Vieira, j. 24/10/2017). (São Paulo, 2017c, no page).

> This is because the right to privacy and the duty of professional confidentiality are not absolute and must be weighed against other legal norms. They cannot prevail over the public interest in investigating a fact classified as a crime. (Habeas Corpus No. 2188904-77.2017.8.26.0000, from Jaú, Relator Des. Diniz Fernando, j. 05/02/2018). (São Paulo, 2018a, no page).

There is also a ruling in the opposite direction, arguing against the evidence produced and declaring it inadmissible due to the violation of medical confidentiality:

> Conforme se verifica do documento referido, guia de encaminhamento de cadáver, há anotação realizada pela médica, que ultrapassa o necessário para as informações de destinação do documento e viola o sigilo profissional. A médica registrou, além de diversas informações:
> "mãe compareceu no pronto-socorro de ginecologia, onde constatou-se medicação intravaginal abortiva" (fl. 194). Bem, não fosse a médica efetuar o registro desta informação no documento, que recebeu sob o sigilo médico, e encaminhá-la para a delegacia, não haveria prova alguma contra a acusada e a persecução criminal não teria sido instaurada. As outras informações que constam no documento em tela eram devidas para os encaminhamentos que se apontavam necessários naquele momento. Mas por que uma médica viola o sigilo médico e registra naquele documento a anotação supra? Esta reprovável ação da médica, caracteriza-se por ter produzido prova ilícita, na medida em que feriu o princípio constitucional da tutela à intimidade e um dos fundamentos da República Brasileira, agasalhado no artigo 3º da Constituição Federal: a dignidade da pessoa humana.
> Sob o manto destes princípios e valores fundantes é que se encontra o direito ao segredo profissional, com normativa que

pode ser encontrada: no artigo 154 do Código Penal (que tipifica o crime de revelação de segredo, sem justa causa, de que tem ciência em razão de função, ministério, ofício ou profissão, e cuja revelação possa produzir dano a outrem); artigo 207 do Código de Processo Penal (estabelece a proibição de depor para as pessoas que devem guardar segredo em função de ministério, ofício ou profissão); no artigo 229, inciso I do Código Civil; artigos 347, inciso II e 406, inciso II do Código de Processo Civil; além do Código de Ética Médica, do Conselho Federal de Medicina. (Habeas Corpus nº 2188896-03.2017.8.26.0000, Rel. Des. Kenarik Boujikian, j.08/03/2018). (São Paulo, 2018b, no page)

AS WE CAN SEE FROM THE REFERENCED DOCUMENT, THE DEATH CERTIFICATE FORWARDING GUIDE, THERE IS AN ANNOTATION MADE BY THE DOCTOR THAT EXCEEDS THE NECESSARY INFORMATION FOR THE DOCUMENT'S PURPOSE AND VIOLATES PROFESSIONAL SECRECY. THE DOCTOR RECORDED, IN ADDITION TO VARIOUS OTHER DETAILS:

"MOTHER ATTENDED THE GYNECOLOGY EMERGENCY ROOM, WHERE INTRAVAGINAL ABORTIVE MEDICATION WAS FOUND" (PAGE 194). IF THE DOCTOR HAD NOT MADE THIS NOTE IN THE DOCUMENT, WHICH WAS RECEIVED UNDER MEDICAL CONFIDENTIALITY, AND FORWARDED IT TO THE POLICE, THERE WOULD HAVE BEEN NO EVIDENCE AGAINST THE ACCUSED, AND CRIMINAL PROSECUTION WOULD NOT HAVE BEEN INITIATED. THE OTHER INFORMATION INCLUDED IN THE DOCUMENT WAS NECESSARY FOR THE APPROPRIATE REFERRALS AT THAT MOMENT. BUT WHY WOULD A DOCTOR VIOLATE MEDICAL CONFIDENTIALITY AND RECORD THIS NOTE IN THE DOCUMENT?

THIS REPREHENSIBLE ACTION BY THE DOCTOR CONSTITUTES THE PRODUCTION OF INADMISSIBLE EVIDENCE, AS IT VIOLATED THE CONSTITUTIONAL PRINCIPLE OF PRIVACY PROTECTION AND ONE

> of the fundamental principles of the Brazilian republic, enshrined in article 3 of the federal constitution: the dignity of the human person.
>
> it is under the protection of these founding principles and values that the right to professional secrecy is upheld, with legal provisions found in: article 154 of the penal code (which criminalizes the disclosure of a secret without just cause, obtained through function, ministry, office, or profession, when such disclosure could harm others); article 207 of the criminal procedure code (prohibiting individuals who are obligated to maintain secrecy in their profession from testifying); article 229, section i of the civil code; articles 347, section ii, and 406, section ii of the civil procedure code; as well as the medical ethics code of the federal council of medicine. (habeas corpus no. 2188896-03.2017.8.26.0000, reporting judge des. kenarik boujikian, judgment on 08/03/2018).

It is observed, therefore, that when medical confidentiality is breached, the woman who undergoes an abortion enters the Criminal Justice System, but in a way that violates rights beyond those imposed by the very criminalization of abortion.

A study by Danielle Ardaillon (2000)[49], featured in the paper *Para uma cidadania de corpo inteiro: a insustentável ilicitude do aborto*, deserves attention. She argues that abortion is, in fact, a crime rarely punished when the accused are the pregnant women, particularly in cases of self-induced abortion, and only lightly penalized in the case of midwives, nurses, and other agents. She further argues that this is not a simple impunity arising from negligence or disregard; on the contrary, there is a paradox that deserves attention. The author points out that there is a significant social investment in the prohibition of abortion

(laws, police, imprisonment), coupled with little insistence on its actual penalization. This observation allows for the hypothesis that society is not truly concerned with the punishment of abortion. The state, caught in this paradox, persecutes and mistreats, but does not punish.

Ardaillon (2000, p. 10) reached these conclusions after conducting empirical research in the Jury Courts of Pinheiros, Santo Amaro, and Jabaquara, all in São Paulo, over 20 years ago. She conducted the research by reviewing the files of investigations and cases, which were manually recorded by the clerks of the respective courts. She began her survey at the Jury Court of the Regional Courthouse of Pinheiros, relating approximately 27 police investigations between 1988 and 1992, and four cases that went to trial. She selected nine cases from different years. In this sample, she found that most of the abortion cases consisted only of police investigations that failed to gather enough evidence to support a prosecutor's indictment, which would allow the judge to accept it and allow the criminal prosecution to proceed.

The second Jury Court she researched was in Santo Amaro, following the same process, examining files labeled "abortion," from which she selected 13 cases. Ardaillon (2000) also found that all were dismissed investigations. The majority were investigations of "fetal remains," categorized by the police as "abortions." Up to this point in the research, the documents referred to either dismissed investigations or cases with a decision of dismissal for lack of evidence, meaning that the cases had not been presented for trial by the jury. The author noted that there seemed to be something about the crime of abortion that hindered its legal treatment, so she decided to expand her research to the Jury Court of Jabaquara, covering a longer period — decades of the 1970s and 1980s. She reviewed 765 decisions over 20 years (between 1970 and 1989). The conviction rate by the jury was 4%, and only 13% of the cases went to trial. In other words, 87% of the cases did not result in a

criminal finding, meaning that there was insufficient evidence to prove the existence of the abortion crime.

The difficulties in gathering evidence lie in the issues of "authorship" and "materiality." Thus, abortion can only be committed on a woman where pregnancy is proven. If pregnancy is not proven, it cannot be claimed that an abortion occurred. In such cases, it is difficult to collect evidence that can prove the pregnancy under the clandestine and secretive circumstances in which the abortion is carried out. There is still a need to prove that the abortion was induced, not spontaneous:

> Materialidade e autoria constituem um todo facetado entre a intenção de cometer o crime, a ação para provocá-lo e a sua consumação; este conjunto configura uma rede de relações de causa e efeito, com malhas mais ou menos frouxas por onde se insinuam e se instauram todas as dúvidas possíveis. É aí que pode ser evidenciada toda a ambiguidade da sistemática de julgamento, é nessa rede que se desenham os caminhos da interpretação de um fato e da atribuição do qualificativo de criminoso a este fato. (Ardaillon, 2000, p. 14)

> Materiality and authorship constitute a multifaceted whole that encompasses the intention to commit the crime, the action to provoke it, and its consummation. This set forms a network of cause-and-effect relationships, with more or less loose connections through which all possible doubts may emerge and establish themselves. It is here that the ambiguity of the judgment system becomes evident; it is in this network that the paths of interpreting a fact and attributing the label of "criminal" to that fact are drawn.

Many investigations involve fetuses found in public places. In these cases, witnesses or the pregnant women are rarely found. Even the coroner's examination conducted when the fetus is found often fails to determine the cause of death—whether it was a spontaneous or induced abortion—and it does not establish a causal relationship between the woman's behavior and the death of the fetus. In this situation, the legislation forces police officers to spend years investigating "abortion" cases that are doomed to be dismissed from the start. There is only the trace of a crime, the author of which, forever anonymous, is the victim.

> Trata-se de um crime de difícil comprovação e por isso mesmo é fértil terreno para debates retóricos onde se entrecruzam os argumentos biológicos e jurídicos: havia gravidez? era atraso de ciclo? houve sangramentos anteriores? foi aborto espontâneo? uma queda de escada pode provocar ou não uma rotura de útero? etc. Houve aborto? Houve crime? A materialidade deste fato não é tão facilmente comprovada, nem a sua autoria tão diretamente atribuível, como se poderia pensar de início. De fato, antes de um aborto tem que ter havido uma gravidez plenamente comprovada; a interrupção dessa gravidez tem que ter sido provocada com real intenção de abortar; tem que haver um feto, e se achado o feto, ele tem que ser daquela mulher que, supõe-se, abortou. (Ardaillon, 2000, p. 17)

> This is a crime that is difficult to prove, and for this very reason, it is fertile ground for rhetorical debates where biological and legal arguments intertwine: was there a pregnancy? Was it a delayed cycle? Were there prior bleedings? Was it a spontaneous abortion? Can a fall down the stairs cause a uterine rupture or not? etc. Was there an abortion? Was there a crime? The

> materiality of this fact is not so easily proven, nor is its authorship so directly attributable, as one might think at first. In fact, before an abortion, there must have been a fully confirmed pregnancy; the interruption of this pregnancy must have been caused with the real intention to abort; there must be a fetus, and if the fetus is found, it must belong to the woman who is assumed to have had the abortion.

From all that has been presented, what is evident is that the secondary criminalization of abortion does not align with the supposed gravity of the attack on life and its need for punishment, as is often claimed by those who defend its criminalization. It seems that the justice system faces numerous evidentiary difficulties (materiality, causality nexus, etc.) in the cases that come to its attention, which should not even reach it if medical confidentiality were respected. In other words, Criminal Law is merely used to push hundreds of Black, Brown, poor women, and those with lower levels of education into unsafe abortions and to death or irreparable sequels.

The next subsection will show a situation that has hardly changed since Ardaillon's findings from the 1970s, 1980s, to the early 1990s.

3.3.1 Analysis of police inquiries and criminal abortion cases in the First Jury Court of São Paulo from 1990 to 2012 and "de facto decriminalization"

Throughout the development of this work, I was able to observe the numerous obstacles and difficulties involved in conducting socio-legal research. Certainly, analyzing documents produced by the Judiciary, that is, using hundreds of legal cases as the object of analysis, is a

difficult task, starting with their identification and location, and then noticing how many inconsistencies exist in the data, which sometimes appear in some records and sometimes do not appear.

The cases were collected through research in the dismissed case register books at the I Court of Jury of São Paulo. These books begin with handwritten notes by various clerks who have worked there. The latest volumes are printed on dot-matrix printers. Since many clerks make the entries, the same data is not always found in all fields. Several cases were not located in the general archive of the Court of Justice due to difficulties in recording the archive entries of the inquiries and cases in the consulted books.

The chosen period aimed to investigate whether there would be any impact on abortion cases after the enactment of the Federal Constitution of 1988, focusing on the constitutional rights already discussed in part 2 of this book. The period ends in 2012 when case records became fully computerized, and the books were no longer filled out manually. This methodology allowed the discovery of police investigations on abortion that were dismissed, which turned out to be the largest volume of data in the research. After 2012, with the informatization, the data on dismissed inquiries are no longer visible and accessible.

The objective of this chapter was to answer the question of whether secondary criminalization, carried out by the agents responsible for enforcing the law, is effective when it comes to abortion. This research was particularly interested in understanding what was happening with women prosecuted for abortion and the outcomes of their cases. Were they being convicted or acquitted? In other words, how was secondary criminalization being carried out? The initial hypothesis was that, although abortion is considered a crime under the Penal Code (primary criminalization), secondary criminalization is weak and not effectively carried out by the justice system. Beyond

this scope, other quantitative and qualitative data were collected to minimally map who these women are, under what circumstances they perform abortions, how they end up in the criminal system, and what tends to happen, etc. The following data were sought:

a. Personal information on the defendant: who are the women prosecuted for abortion?

- age group;
- occupation;
- race/ethnicity;
- income;
- marital status;
- number of children;
- education level.

b. Data about the proceedings:

- case dismissed;
- stay of procecedings;
- sentenced (conviction, aquittal).

c. Other data:

- who reported the crime? (family member, doctor/health professional, anonymous tip, other);
- did the woman make the decision alone? Was the father involved?;
- methods used for the abortion;
- is it possible to identify, in the discourse of the actors (police, prosecutor, defense attorney, judge, and witnesses), and in the testimony of witnesses, representations regarding motherhood/fatherhood, the role of women, sexuality, or stereotypes about women?;

- is it possible to identify the presence of religious or moral arguments against abortion?;
- is the argument of the right to life used as an absolute right?

The research was limited to the analysis of the investigations and cases from the First Criminal Court of the Capital, covering a relatively long period, from 1990, two years after the promulgation of the 1988 Federal Constitution, until 2012. These limitations do not allow for significant extrapolations or geographic generalizations, but it is believed that they are sufficient for an initial look into such a scarce universe of research based on judicial case files. The research engages in dialogue, at certain points, with the few existing studies.

What was observed is that the collection of personal and identifying data of the accused, during the police investigation phase, is not always carried out, and questions and forms have undergone some variations over time. That is, there is a noticeable lack of concern, on the part of the Justice System, with the collection of data for potential systematization and analysis that could inform public security policies, access to justice, and so on.

Between 1990 and 2012, around 518 case records were found in the books researched at the First Criminal Court. Access was only obtained to 143 out of 518, which had been dismissed. It was not possible to locate all the records in the general archive, since often the numbering in the case registry books related to archiving (package number, box, etc.) could not be found, or there was no archiving number in the case registry book for certain processes, which completely hindered the location of those case files in the General Archive of the São Paulo State Court of Justice. Therefore, the data compiled refers to 143 cases out of a total of 518 that were located.

These 143 cases were reopened and fully read, even though the initial intention was to analyze the narratives and discourses of the operators in the Criminal Justice System. However, since 91% were police investigation files, it was only possible to capture the very beginning, the parts prior to the proceeding, such as evidence collection, witness hearings, forensic reports, data on the women who had abortions, their stories, and the role of the Public Prosecutor's Office, which, in 91% of the cases, requested the dismissal of the investigation due to insufficient evidence, with the Judge's agreement.

The jurisdiction of the Jury Courts in the city of São Paulo is divided according to Police Departments (DPs), including the Women's Defense Police Department (DDMs). The First Jury Court of the Capital is responsible for the following Police and the Women's Defense Police Department:

- 1st DP 410, Gloria St – Liberdade;
- 2nd DP 383, Jaraguá St – Bom Retiro;
- 3rd DP 322, Aurora St – Santa Efigênia;
- 4th DP 246, Marquês de Paranaguá St – Consolação;
- 5th DP 160, Prof. Antonio Prudente St – Liberdade;
- 6th DP 70, Hermínio Lemos St – Cambuci;
- 8th DP 206, Sapucaia St – Brás;
- 12th DP 950, Rio Bonito St – Brás;
- 16th DP 89, Onze de Junho Av – Vila Clementino;
- 17th DP 534, Dom Luiz Lazagna St – Ipiranga;
- 18th DP 350, Juventus St – Alto da Mooca;
- 26th DP 50, Padre Arlindo Vieira Av – Sacomã;
- 27th DP 407, Demóstenes St – Campo Belo;
- 29th DP 3259, Sapopemba Av – Vila Diva;
- 32nd DP 64, Sabbado D'Angelo St – Itaquera;

- 35th DP 322, Engenheiro George Corbisier Av – Jabaquara;
- 36th DP 921, Tutóia St – Vila Mariana;
- 42nd DP 1588, Oratório Av – Parque São Lucas;
- 44th DP 386, Salvador Gianetti St – Guaianazes;
- 49th DP 870, Ragueb Chohfi Av – São Mateus;
- 52nd DP 400, Dr. Corinto Baldoino Costa St – Parque São Jorge;
- 54th DP 175, Gráficos Av – Cidade Tiradentes;
- 56th DP 264, Dra. Esmeralda Mendes Policine St – Vila Alpina;
- 57th DP 2220, Oratório St – Parque Da Mooca;
- 58th DP 362, Antúrios St – Vila Formosa;
- 59th DP 120, Vistosa da Madre de Deus St – Jardim Noêmia;
- 67th DP Severino Jose Fernandes St, 1900 – Jardim Robru;
- 68th DP João da Silva Aguiar St, 850 – Lageado;
- 69th DP Arquiteto Vila Nova Artigas Av, 720 – Teotônio Vilela;
- 70th DP Otavio Alves Dundas St, 390 – Sapopemba;
- 77th DP Glete Av, 827 – Santa Cecília;
- 78th DP Estados Unidos St, 1608 – Jardins;
- 81st DP Celso Garcia Av, 2875 – Belém;
- 83th DP Ângelo Bertini St, 82 – Parque Bristol;
- 89th DP Domingos Simões St, 21 – Portal do Morumbi;
- 95th DP Comandante Taylor St, 1180 – Cohab Heliópolis;
- 96th DP Engenheiro Luiz Carlos Berrini Av, 900 – Brooklin;
- 97th DP Imigrantes Rd, km 11,5 – Americanópolis;
- 98th DP Angelo Cristianini Av, 467 – Jardim Miriam;
- 99th DP Sargento Manoel Barbosa da Silva St, 115 – Campo Grande;
- 1st DDM; 2nd DDM; 5 th DDM e 6th DDM.

Regarding the profile of the defendants, the following data was found.

a. Age group:

- The age was registered in 80 out of 138 reopened cases.

TABLE 1 – Profile of defendants by age group

Age group	Number of cases	%
18 - 19	9	11%
20 - 29	47	59%
30 - 39	21	26%
40 +	3	4%
Total	**80**	

Source: made by the author

b. marital status:

- Marital status was reported in 80 out of 143 cases, and the majority of the women were single (72%).

TABLE 2 – Profile of defendants by marital status

Marital status	Number of cases	%
Married / Civil Union	21	28%
Single	55	72%
Total	**76**	

Source: made by the author

c. race/ethnicity:

- The information was available in 59 cases, and the majority of the women (53%) were black or brown.

TABLE 3 – Profile of defendants by race/ethnicity

Race / Ethnicity	Number of cases	%
White	28	47%
Black / Brown	31	53%
Total	**59**	

Source: made by the author

d. children:

- Women stated that they had other children in 33 out of 81 cases. In 45% of the cases, they had one child.

TABLE 4 – Profile of defendants regarding children

Children	Number of cases	%
No	48	59%
Yes	33	41%
Total	**81**	

Source: made by the author

TABLE 5 – Profile of defendants by number of children

Number of children	Number of cases	%
1	15	45%
2	11	33%
3	4	12%
4	3	9%
Total	**33**	

Source: made by the author

e. education level:

- 70 cases were analyzed, as the following table shows:

TABLE 6 – Profile of defendants by education level

Education	Number of cases	%
Elementary school	7	10%
Incomplete elementary school	2	3%
High school	6	9%
Incomplete high school	2	3%
Illiterate	2	3%
Incomplete higher education	1	1%
Higher education	1	1%
Literate	49	70%
Total	**70**	

Source: made by the author

f. occupation:

- Information regarding the professional activity of the women prosecuted was available in 67 out of 143 cases.

TABLE 7 – Profile of defendants by occupation

Ocupation	Number of cases	%
Homemaker	14	21%
Housekeeper	13	19%
Student	4	6%
Cleaning services	5	7%
General assistant	5	7%
Administrative assistant	4	6%
Self-employed	3	4%
Sales promoter	3	4%
Others	16	24%
Total	**67**	

Source: made by the author

It was found that, regarding the profile of the women who were prosecuted for abortion by the First Jury Court of the Capital during the studied period (1990 to 2012), the majority were between 20 and 29 years old (59%), single (72%), black or mixed-race (53%), and 41% of them already had children from previous pregnancies, with most having one child (45%).

It was recorded that 70% claimed they "knew how to read and write", but this expression does not inform about the educational background of the defendants. When this phrase was used, nothing was mentioned about their formal schooling. Only 10% had completed elementary school, and 9% had completed high school. Only two women had a university degree, with just one having completed higher education.

The professions were varied (cleaning assistants, administrative assistants, service assistants, etc.), with a predominance of domestic workers (19%) and housewives (21%).

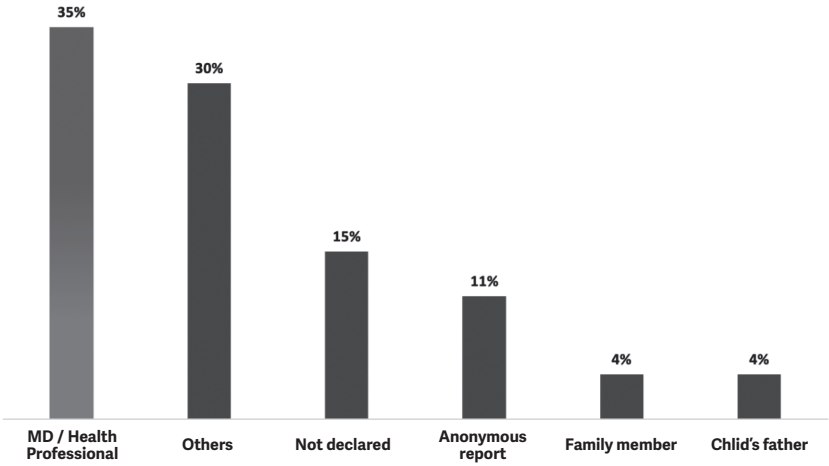
Thus, regarding the profile of these women who were criminalized for abortion at the First Jury Court of the Capital between 1990 and 2012, most were black or mixed-race, had low education, and had previous children.

There was no income information available in the analyzed cases, but other studies, previously mentioned throughout the book, point out that poor women are the ones who undergo unsafe abortions, risking their lives and health, as women with financial resources typically pay for safer abortion procedures, but still face the difficulties of performing an act considered illegal and criminal, that is, in secrecy and clandestinity.

How are these women typically accused? It was observed that there were accusations from relatives, fetuses found by the police, anonymous tips, the father of the child, and a significant percentage of accusations made by health professionals (35% out of 143 cases). These are the very individuals who should maintain confidentiality,

as revealing this information exposes the patient to criminal prosecution, as previously discussed.

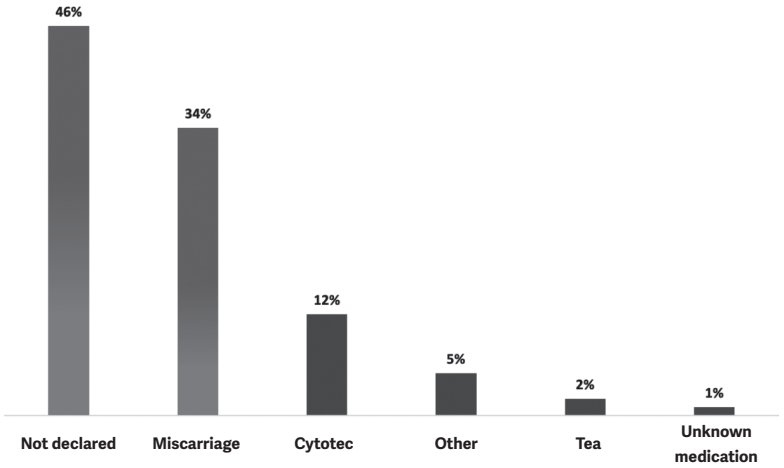
GRAPH 1 – Who reports the woman



Source: made by the author

Regarding the method used to induce pregnancy termination, in 12% of the cases, the medication known as "cytotec," which is the substance misoprostol, was used, and this medication is restricted to hospital use. In 46% of the cases, no declaration was made regarding the method used, and in 34% of the cases, the abortions were considered spontaneous, sometimes based on the mother's statement or due to inconclusive reports, etc.

CHART 2 – Methods used to induce pregnancy termination



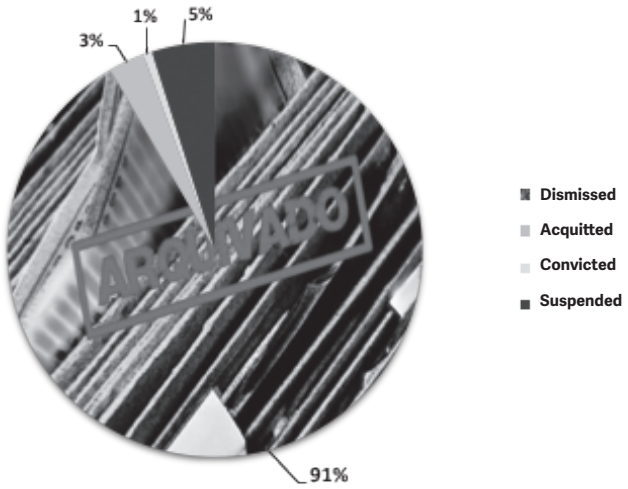
Source: made by the author

As for the results of these investigations and cases, what was found is very impressive, as 91% of the 143 cases analyzed had been dismissed due to lack of evidence: authorship could not be determined, it was not proven that the abortion had been induced, no causal link was established, in the sense that the mother's or a third party's actions had caused the death of the fetus/embryo, sometimes with no materiality because the fetus/embryo was never found, etc. Therefore, a significant number of women who are investigated, have to give statements to the police, suffer embarrassment in hospitals, and experience social stigma from family and friends, are not even charged by the Prosecutor, and the police inquiry files are dismissed, never leading to a criminal trial. These cases constitute the majority. In 5% of cases, charges were filed, and the woman accepted the conditional discontinuation of criminal prosecution. In 3%, she was sentenced and acquitted, and in 1%, she was sentenced and convicted.

This is the scenario of secondary criminalization of women who were prosecuted for abortion at the First Jury Court from 1990 to

2012. The Criminal Justice system is driven to cause more suffering and pain, beyond what is already inflicted by the mere existence of primary criminalization.

GRAPH 3 – Results of legal inquiries and cases



Source: made by the author

It is interesting to note that this secondary non-criminalization was already observed 40 years ago by Santos (1978, p. 21):

> A difusão social do aborto é facilitada por uma repressão legal insignificante. A impotência dos aparelhos de controle social é explicada pela conceituação do aborto como crime sem vítima, caracterizado por (a) uma prática privada consensual, em que a mulher não se considera vítima, nem denuncia o abortador, por temor à publicidade e à própria incriminação, (b) ambos os partícipes estão ligados por interesses comuns (evitar a punição e os efeitos socialmente danosos do processo, e (c) esse intercâmbio exprime uma relação de pagamento voluntário por

serviços pleiteados, irrelevando a eventual ilicitude. A extensão da impunidade do aborto ilegal é, praticamente, proporcional à extensão social de sua incidência: pesquisas mostraram que mulheres raramente são condenadas (nos EUA não há registro de condenação de mulheres, por aborto), os estabelecimentos hospitalares utilizados para a prática do aborto não são objeto de medidas legais ou administrativas, os responsáveis por esses estabelecimentos, e os médicos que praticam abortos estão isentos de punição, e até, os "açougueiros", que operam em escala reduzida, evitam a sanção legal.

THE SOCIAL DIFFUSION OF ABORTION IS FACILITATED BY INSIGNIFICANT LEGAL REPRESSION. THE IMPOTENCE OF SOCIAL CONTROL MECHANISMS IS EXPLAINED BY THE CONCEPTUALIZATION OF ABORTION AS A VICTIMLESS CRIME, CHARACTERIZED BY (A) A CONSENSUAL PRIVATE PRACTICE, IN WHICH THE WOMAN DOES NOT CONSIDER HERSELF A VICTIM, NOR DOES SHE REPORT THE ABORTION PROVIDER, FOR FEAR OF PUBLICITY AND SELF-INCRIMINATION; (B) BOTH PARTICIPANTS ARE LINKED BY COMMON INTERESTS (AVOIDING PUNISHMENT AND THE SOCIALLY HARMFUL EFFECTS OF THE PROCESS); AND (C) THIS EXCHANGE EXPRESSES A RELATIONSHIP OF VOLUNTARY PAYMENT FOR REQUESTED SERVICES, REGARDLESS OF THE POTENTIAL UNLAWFULNESS. THE EXTENT OF IMPUNITY FOR ILLEGAL ABORTION IS, PRACTICALLY, PROPORTIONAL TO THE SOCIAL EXTENT OF ITS INCIDENCE: STUDIES HAVE SHOWN THAT WOMEN ARE RARELY CONVICTED (IN THE U.S., THERE IS NO RECORD OF WOMEN BEING CONVICTED FOR ABORTION), THE HOSPITALS USED FOR ABORTION PROCEDURES ARE NOT SUBJECT TO LEGAL OR ADMINISTRATIVE MEASURES, THOSE RESPONSIBLE FOR THESE ESTABLISHMENTS, AND THE DOCTORS WHO PERFORM ABORTIONS ARE EXEMPT FROM PUNISHMENT, AND EVEN THE "BUTCHERS" WHO OPERATE ON A SMALLER SCALE MANAGE TO AVOID LEGAL SANCTIONS.

Santos (1978), at various points in his article, mentions that in Brazil there were no data available. This was 40 years ago. The situation today is not much different when it comes to data on women prosecuted for abortion. There is almost no research or data on this topic. Danielle Ardaillon's (2000) research, conducted 20 years ago and previously mentioned, shows the same situation two decades later.

The research conducted here, based on a survey of abortion cases at the First Court of Jury of the Capital, although limited and modest in scope, confirms what was observed by them: insignificant legal repression, so much so that primary criminalization reveals concerning hypocrisy, causing harm and suffering, often deaths and mutilation of poor, Black, Brown, less educated women who end up undergoing clandestine and unsafe abortions.

3.4 CRITICAL AND FEMINIST CRIMINOLOGY AND ABORTION IN BRAZIL

> *The husband called the police after learning that his wife had had an abortion. He pointed out to the officers where the packaging of the cytotec was located. He said he had undergone a vasectomy because he already had two children from a previous marriage. The report indicated that the packaging found was inconclusive regarding the medication. The police inquiry was dismissed.*
>
> *Marina felt unwell, with severe abdominal pain, and was taken to the hospital, where she had the abortion of the fetus. She had previously experienced other complicated pregnancies.*
>
> *The police were called to attend an occurrence of a fetus found in an abandoned lot inside a steam iron box. The packaging had*

> *a purchase date label and the receipt. The witness said that a homeless person asked if they could take the box from their trash can, and soon after, they saw the box fallen with a fetus inside and called the police. They could not identify the homeless person.*

The analysis proposed in this book, regarding the decriminalization of abortion, engages with constitutional law from the perspective of fundamental rights protection; with international human rights law, which imposes protection for women's human rights; with criminal law, as abortion is criminalized in Brazil; and with criminology, as it is a clear subject for questioning and problematizing the imposition of criminal abortion laws.

In this sense, this book presents an exercise in critical and feminist criminology in order to critically investigate the criminalization of abortion, the demands for expanding possibilities for decriminalization, whether the stated goals of criminalization are being met, etc.

Baratta (1999, p. 19) states that the unequal position of women in criminal law – whether as victims or perpetrators of a crime – became an increasing focus of attention in criminology starting in the 1970s.

In other words, this coincides with the beginning of gender studies in the social sciences, as seen in the first part of the book, with the concern to study criminal policies, criminalization, the application of criminal law, and the incidence of criminal norms, from the perspective of gender social relations, in a society and legal system still marked by a patriarchal model of relations between women and men, in a science that was, until then, formulated by men and for men.

Campos (2017, p. 271) clearly defines the field of feminist criminology:

> A criminologia feminista incluiria, desta forma, uma perspectiva teórica sobre gênero e desigualdade de gênero e sua

> interseccionalidade com os indicadores de raça, classe, idade, dentre outros. Por conseguinte, o que diferenciaria a criminologia feminista da análise criminológica dominante (*mainstream*) sobre "mulher e crime" é o fato de que as teorias de gênero são o ponto de partida para análises criminológico-feministas.

> Feminist criminology would thus include a theoretical perspective on gender and gender inequality and its intersectionality with race, class, age, and other indicators. Consequently, what differentiates feminist criminology from the dominant criminological analysis (mainstream) on "women and crime" is the fact that gender theories serve as the starting point for feminist criminological analyses.

Carvalho (2015, p. 202), when analyzing the interconnections between criminology, legal guarantees, and human rights, provides important contributions to understanding this dynamic and these relationships:

> Neste sentido, o discurso da modernidade sobre os direitos individuais encontra guarida e correspondência no garantismo penal clássico – concepção teórica ilustrada do direito penal, do processo penal e da política criminal centrada na busca de limitação do poder estatal punitivo através da radicalização dos princípios da legalidade dos delitos, da proporcionalidade e da humanidade das penas e da jurisdicionalidade dos órgãos de decisão.

> In this sense, the discourse of modernity regarding individual rights finds shelter and correspondence in classical penal guarantees—an illustrative theoretical conception of criminal law, criminal procedure, and criminal policy focused on limiting the punitive power

> OF THE STATE THROUGH THE RADICALIZATION OF THE PRINCIPLES OF LEGALITY OF CRIMES, PROPORTIONALITY, HUMANITY OF PUNISHMENTS, AND THE JURISDICTIONALITY OF DECISION-MAKING BODIES.

The theses that guide the defense of the decriminalization of abortion in this work are precisely: the use of proportionality in analyzing the criminalization of abortion, the critique of Criminal Law in its incapacity to protect the life of the embryo, and the criminal proceedings that target women, which fail to reveal the true facts about voluntary termination of pregnancy or to demonstrate that the criminal policy of abortion criminalization is capable of preventing its occurrence.

In the defense of the decriminalization of abortion, the use of the guarantee-based paradigm is considered relevant, as it is a model aimed at controlling and minimizing punitive powers. However, it is important to mention and expose the paradox of this model in the critique presented by Carvalho (2015, p. 230 and 233) regarding the reversibility of the guarantee-based discourse:

> No aspecto penal e político criminal, embora o garantismo projete modelo minimalista de contração dos tipos penais incriminadores através dos processos legais de descriminalização ou do rigoroso controle de constitucionalidade concreto e difuso (descriminalização judicial), ao redesenhar teoria justificacionista da pena acaba por legitimar variadas formas de intervenção punitiva.

> IN THE PENAL AND CRIMINAL-POLITICAL ASPECT, ALTHOUGH THE GUARANTEE-BASED MODEL PROJECTS A MINIMALIST APPROACH TO THE CONTRACTION OF CRIMINAL OFFENSES THROUGH LEGAL PROCESSES OF DECRIMINALIZATION OR THE STRICT CONTROL

> of concrete and diffuse constitutionality (judicial decriminalization), by redesigning the justifying theory of punishment, it ends up legitimizing various forms of punitive intervention.

The feminist debate in the penal field is immersed in this relationship between *garantismo*, minimal criminal law, and the protection of fundamental rights. There is a demand for the protection of freedom, self-determination over women's bodies, and the agenda of decriminalizing abortion as a necessary means of ensuring equal protection of these bodies from violence, which primarily occurs in the domestic sphere:

> O que, para muitos, corresponde a uma pauta de reivindicações contraditória do movimento feminista, pois ao mesmo tempo em que reivindica de forma libertária a descriminalização do aborto (numa tendência abolicionista), assume uma postura punitivista, ao pleitear penas mais duras em casos de violência de gênero. (Mendes, 2014, p. 185)

> For many, this represents a contradictory agenda within the feminist movement, as it simultaneously calls for the decriminalization of abortion in a libertarian manner (in an abolitionist trend) while adopting a punitive stance by advocating for harsher penalties in cases of gender-based violence.

The feminist perspective applied to the penal and criminological field presents challenges in considering the specificities of gender-based violence, including both abortion—where the woman is the defendant—and offenses against physical or mental integrity—where

the woman is the victim—in order to protect women's human rights in both contexts. It is argued here that it is possible to think about using the guarantee of minimal criminal law with respect to gender-based violence, and it is understood that Act No. 11,340/2006 (Maria da Penha Law) aligns with the principles of penal *garantismo*.

The crime of abortion, as outlined in the Brazilian Penal Code, falls under the Title on Crimes Against the Person and the Chapter on Crimes Against Life. Therefore, one might assert that the idea is to protect both life and the person. However, in the case of abortion, achieving this goal is not so straightforward. Firstly, the consideration of the embryo or fetus as a person with its own rights and interests is controversial in general science, as is the question of when life begins, or even at what moment it should be protected, even if there is agreement on when life begins. Thus, criminalizing abortion involves a series of philosophical, moral, religious, social, cultural, political, medical, biological, and other considerations, making its criminalization highly controversial and the use of criminal law to resolve a moral-type controversy highly questionable.

Ferrajoli (2003, p. 11), when arguing that procreation is not only a biological fact but also a moral act of will, effectively exposes the critique of using criminal law in the abortion issue:

> A procriação, como a pessoa, não é só um facto biológico, mas é também um acto moral de vontade. E precisamente este acto de vontade, em virtude do qual a mãe encara o feto como pessoa, que, segundo esta tese, lhe confere o valor de pessoa: que *cria* a pessoa. Podemos antecipar o "nascimento" da pessoa antes do parto: desde que seja claro que ela, segundo a concepção moral defendida aqui, está de certa forma ligada ao acto com o qual a mulher se encara e se deseja como "mãe" e encara e deseja o feto como fruto não só de um processo biológico, mas também de

um acto de consciência e de vontade. Com ela, a mãe dá não só corpo, mas também forma de pessoa ao nascituro, pensando-o como filho. Por outras palavras: se é verdade que, para nascer, o embrião precisa da (decisão da) mãe, então essa decisão muda a sua natureza, fazendo dele uma (futura pessoa). A sua qualidade de "pessoa" é, em suma, decidida pela mãe, ou seja, pelo sujeito que é capaz de o fazer nascer como tal.

Naturalmente, nem todos partilham dessa concepção moral da pessoa e da maternidade. Tal concepção não é mais "verdadeira" (mas, a meu ver, apenas mais razoável) do que aquela que vê no embrião, uma pessoa, independentemente da vontade da mãe de o fazer nascer. Não é mais verdadeira, nem mais falsa. As duas concepções são, no entanto, incompatíveis. No terreno moral, não existe de facto possibilidade de acordo ou compromisso, mas apenas de tolerância recíproca. E a tolerância consiste, neste caso, em reconhecer a ambas as concepções o caráter de legítimas posições morais, nenhuma das quais é desqualificável como "imoral" só porque não compartilhada. Mas isto equivale a não brandir contra nenhuma delas o Código Penal, como gostam de fazer, pretendendo impor a todos a sua moral, os defensores da punição do aborto.

Procreation, like the person, is not only a biological fact but also a moral act of will. And it is precisely this act of will, by which the mother regards the fetus as a person, that, according to this thesis, confers personhood upon it: it is what creates the person. We can anticipate the "birth" of the person before birth itself: as long as it is clear that, according to the moral conception defended here, the fetus is in some way tied to the act with which the woman perceives herself and desires to be a "mother" and regards the fetus not only as the product of a

> biological process but also as an act of consciousness and will. With this, the mother not only gives body but also form to the unborn child, thinking of it as her child. In other words: if it is true that, for the embryo to be born, it needs the (decision of) the mother, then this decision alters its nature, making it a (future person). Its quality as a "person" is, in essence, decided by the mother, that is, by the subject who is capable of making it born as such.
>
> Naturally, not everyone shares this moral conception of personhood and motherhood. This conception is not more "true" (but, in my view, only more reasonable) than the one that sees the embryo as a person, regardless of the mother's will to bring it into the world. It is neither more true nor more false. However, the two conceptions are incompatible. In the moral realm, there is no real possibility of agreement or compromise, only mutual tolerance. And tolerance, in this case, means recognizing both conceptions as legitimate moral positions, neither of which can be disqualified as "immoral" simply because it is not shared. But this amounts to not wielding the Penal Code against either of them, as some advocates of abortion punishment like to do, trying to impose their morality on everyone.

Moreover, it is important to emphasize that the prohibition of abortion through penal legislation represents the imposition of an obligation to act, which, according to Ferrajoli (2003), is constitutionally questionable — meaning the obligation to be a mother. The author argues that, after the abolition of forced labor and personal servitude, it is no longer permissible for criminal law to impose a "do." Criminal law can only impose a "do not do," that is, prohibit behaviors, but it cannot impose actions or, even more so, life choices.

Com a proibição do aborto, e com a consequente coacção penal para ser mãe, impõe-se à mulher, não tanto e não só que não aborte, como também um transtorno de vida incalculável: não só a gestação e o parto, como a renúncia a projectos de vida diferentes, a obrigação de tratar e manter o filho, em resumo, a imposição de uma espécie de servidão. Uma maternidade indesejada pode destruir a vida de uma pessoa: obriga-la a parar de estudar, ou de trabalhar, pô-la em conflito com a própria família, reduzi-la a miséria ou a não ser capaz de cuidar do seu sustento e do próprio filho. Pois bem, a punição do aborto é o único caso em que se penaliza a omissão não de um simples acto – como no caso, aliás isolado, da "omissão de auxílio" - mas de uma opção de vida: a de não querer ser mãe. Esta circunstância é geralmente ignorada. É costume negligenciar o facto de, ao contrário de qualquer outra proibição penal, a proibição do aborto equivale também a uma obrigação – a obrigação de ser mãe, de aguentar uma gravidez, de dar à luz, de criar um filho – em contradição com todos os princípios liberais do direito penal. E não é só. Em contradição com o princípio da igualdade, que quer dizer igual respeito e defesa da identidade de cada um, a penalização do aborto tira à mulher a autonomia sobre o próprio corpo e a sua dignidade de pessoa, reduzindo-a a coisa ou a instrumento de procriação submetida a fins que não são os seus. (Ferrajoli, 2003, p. 12)

With the prohibition of abortion, and the consequent criminal coercion to become a mother, a woman is imposed not only the obligation not to abort but also an incalculable life disruption: not only pregnancy and childbirth but also the renouncement of different life plans, the obligation to care for and raise the child, in summary, the imposition of a kind of servitude. An unwanted motherhood can destroy a person's life: it

> forces them to stop studying or working, puts them in conflict with their own family, reduces them to poverty, or makes them unable to care for their own sustenance and that of the child. Indeed, the punishment of abortion is the only case where the omission is penalized, not a simple act – like in the isolated case of "omission of assistance" – but a life choice: the choice not to want to be a mother. This circumstance is generally ignored. It is common to overlook the fact that, unlike any other penal prohibition, the prohibition of abortion also equates to an obligation – the obligation to be a mother, to endure a pregnancy, to give birth, to raise a child – in contradiction with all the liberal principles of criminal law. And not only that. In contradiction with the principle of equality, which means equal respect and defense of each individual's identity, the penalization of abortion takes away the woman's autonomy over her own body and her dignity as a person, reducing her to an object or instrument of procreation subjected to ends that are not her own.

A critical and feminist criminology cannot shy away from the role of critically questioning the criminalization of abortion, that is, the use of criminal law to address what can be called a fact of life (unwanted pregnancy) for any woman of reproductive age.

In discussing the *Sistema Penal e Direitos da Mulher* [Criminal Justice System and Women's Rights], Maria Lúcia Karam (1995, p. 47) argues that, *não sendo possível a abolição do sistema penal (necessariamente condicionada a transformações sociais mais profundas), a perspectiva de redução da violência e da injustiça geradas pela intervenção do poder punitivo é limitada, devendo ter como meta tão-somente a efetiva concretização de um Direito Penal mínimo* [it is not possible to abolish the

criminal justice system (which is necessarily conditioned by deeper social transformations), the perspective of reducing the violence and injustice generated by the intervention of punitive power is limited, and should aim solely at the effective realization of a minimum criminal law].[50]

As Elena Larrauri (2008, p. 39) argues, it is not easy to reconcile the intent of being a critical criminologist or an abolitionist criminologist while also being a feminist. However, she points out that it is the strategy of her preference. She proposes what she calls unfinished reflections in addressing this issue. She believes that it is acceptable for women's organizations to use the existing criminal law, while also promoting the use of intermediary institutions for help and counseling outside of the criminal system. She also considers necessary what she calls negative reforms, meaning all those changes in criminal and procedural law that empower women to initiate and terminate criminal proceedings at any time. She advocates for not introducing new criminal offenses and using alternative methods without excluding the use of civil law. Finally, she is against the use of symbolic criminal law as a pedagogical tool to send messages.

Several authors deem the use of criminal law to address the issue of abortion as inappropriate, given the wide range of possible approaches and the penal perspective, which proves ineffective with such drastic consequences for the lives of thousands of women. In this sense:

> Todavia, por fidelidade aos limites objetivos do presente trabalho, e para não enveredar pelas graves e controvertidas questões de ordem econômica, política e social que o problema do aborto necessariamente encerra, limitamo-nos por ora a manifestar nossa contrariedade à legislação que dita punição criminal ao aborto, conforme fazem as normas dos artigos 124 a 128 do Código Penal, convencidos de que a inserção do penalismo em contexto existencial tão complexo só desajuda

> o encaminhamento social e jurídico do problema já tão grave, além de fomentar a desobediência civil e a clandestinidade da indústria do aborto com brutais consequências para a pobreza feminina. (Castro, 2003, p. 688)

> However, due to the objective limits of the present work and to avoid delving into the serious and controversial economic, political, and social issues that the abortion problem necessarily involves, we limit ourselves for now to expressing our opposition to the legislation that imposes criminal punishment for abortion, as established by Articles 124 to 128 of the Brazilian Penal Code. We are convinced that the insertion of penal measures into such a complex existential context only hinders the social and legal resolution of the already grave issue, in addition to fostering civil disobedience and the clandestine abortion industry, with brutal consequences for women's poverty.

Questioning the criminalization of abortion means looking at the women who undergo abortions and who are subjected to the criminal justice system, recognizing the enormous selectivity involved, as already discussed, as well as the potential for a reduced application of criminal law. This would minimize the suffering that criminal law can cause by reconciling progressive protection of life in formation with respect for the fundamental constitutional rights of women, applying proportionality in the interpretation, as will be further discussed.

3.5 UNCONSTITUTIONALITY OF THE CRIMINALIZATION OF ABORTION: CONSTITUTIONAL INTERPRETATION IN ACCORDANCE WITH THE 1988 FEDERAL CONSTITUTION AND APPLICATION OF THE PROPORTIONALITY RULE[51]

> *Paula was using homemade tea to lose weight. She didn't know she was pregnant. When she began to feel abdominal cramps and bleeding, she was taken to the hospital by ambulance. The fetus remained at the residence. The police were called to investigate.*
>
> *Sueli didn't know she was pregnant. She drank tea for back pain and felt intense abdominal pain. She expelled the fetus. She called her sister for help, and they went to the hospital. The doctor asked where the fetus was. The hospital called the police.*
>
> *The fetus was found in an empty lot by a scavenger. Investigations were conducted, but nothing was found. The case was dismissed.*
>
> *A fetus was abandoned in a commercial establishment, in the bathroom. After investigations, nothing was found. The case was dismissed.*

This book argues that the decriminalization of abortion in Brazil could be achieved through the Judiciary, specifically via abstract constitutional review, with the involvement of the Supreme Federal Court (STF).

This possibility would not be extraordinary or exceed the constitutional competences established. It would be within the institutional framework, as outlined in the Judiciary's powers, given its role as the highest guardian of the 1988 Federal Constitution. Therefore, there would be no violation of the constitutional principle of the separation of powers.

The Constitution, the highest expression of the people's will, must prevail over laws, which are manifestations of parliamentary majorities. It is up to the Judiciary, in its function of applying the law, to affirm this supremacy by invalidating unconstitutional norms. It is also important to emphasize that the democratic ideal is not limited to the majority principle. The highest constitutional jurisdiction body has the role of being the referee in the process and the guarantor of fundamental rights (Barroso, 2013, p. 343).

It is further understood that there would be room for legislative action within the boundaries imposed by the constitutional interpretation of the fundamental rights involved in the Constitution, to establish a model of indications from a certain point in the gestation and/or informed counseling, etc., legalizing abortion.

Several countries have decriminalized and allowed abortion through judicial decisions of their Constitutional Courts. The emblematic and paradigmatic cases, which have already been discussed here, are from the United States of America and Germany. These decisions, made since the 1970s, have influenced other Constitutional Courts that also decriminalized abortion through decisions by their courts.

Germany's first decision (Abortion I) ruled that it violated the Basic Law, the law that decriminalized abortion within the first 12 weeks of pregnancy, after counseling to dissuade the woman from having an abortion. However, it allowed the legislature to authorize abortion in other circumstances that constitute "extraordinary burdens" of motherhood, such as saving the woman's life, protecting her health, or other analogous indications, such as eugenic indications, sexual violation, and social emergency situations.

In 1973, the U.S. Supreme Court, in the case of *Roe vs. Wade*, ruled that the Texas law, which only allowed abortion to save the woman's

life, violated the U.S. Constitution's protection of privacy, intimacy, and decisional autonomy during the first 12 weeks of pregnancy.

This is shown by Reva B. Siegel (2016), who discusses the constitutionalization of abortion; Ruth Rubio Marín (2016), who discusses abortion in Portugal; and Verónica Undurraga (2016), who discusses the principle of proportionality in the constitutional control of abortion laws.

Siegel (2016, p. 29, 37, and 38) points out that some courts have insisted that governments must respect women's decisions regarding motherhood, while others require governments to control women's decisions about motherhood. In recent decades, an increasing number of courts have allowed governments to protect life by persuading rather than coercing women into assuming a maternal role. Across Europe, more jurisdictions are giving women the final say on abortion decisions as the best way to protect the life of the fetus in light of the Constitution.

In the 1970s, the courts of the U.S., France, Austria, Italy, and Germany first reviewed the constitutionality of abortion laws. The U.S. and Italy struck down laws penalizing abortion, while France and Austria upheld laws that allowed access to abortion. In Germany, a law allowing abortion in the first 12 weeks of pregnancy was declared unconstitutional. The jurisprudence of the 1990s confirmed these constitutional milestones while moderating them.

In 1992, the U.S. Supreme Court, in *Pennsylvania v. Casey*, analyzed the constitutionality of a Pennsylvania law that imposed a 24-hour waiting period before an abortion could be performed, required counseling intended to dissuade the woman from having an abortion, parental consent for minors, and notification of a spouse for married women. The Court reaffirmed the central principle of *Roe vs. Wade* — that a woman has the right to terminate a pregnancy before

fetal viability — but created the "undue burden" filter to assess the constitutionality of the law. That is, the Court stated it would question whether the law aimed to impose a substantial obstacle on a woman seeking an abortion and dismissed spousal consent as a violation of the woman's equality as a citizen.

Siegel (2016, p. 49) reports that in South Africa, in 2004, the Constitutional Court declared the constitutionality of a law allowing abortion on request within the first 12 weeks of pregnancy. In 2007, the Mexican Supreme Court upheld the constitutionality of a law from Mexico City that also permits abortion within the first 12 weeks. In 2006, the Colombian Supreme Court decided that legislation could not prohibit abortion in all cases, as doing so would fail to recognize women as dignified human beings, reduced merely to reproductive tools, and that exceptions must be made for the penalization of abortion in cases of life or health risks (physical or mental) to the woman, as well as cases of fetal anomalies incompatible with life outside the womb.

Marín (2016, p. 58-59) reports that in Portugal, in 2007, a model of abortion periods was introduced. In 2010, the Constitutional Court validated the law allowing women to decide if they wish to abort within the first 10 weeks of pregnancy, with open counseling, meaning informative counseling without the intent to dissuade the woman from having an abortion. Since the 1980s, Portugal has decided the issue of abortion five times, progressively modifying it and making it more permissive. Between 1984 and 1985, the Court evaluated a legal reform based on the indication model (saving the woman's life or protecting her health, severe fetal malformations, or rape), replacing an absolute criminal ban on abortion. Between 1998 and 2006, the Court confirmed the constitutionality of the progressive reform through a national referendum, introducing the period model. In the 2010 ruling, the Court advanced the development

of a European constitutional right to abortion, confirming the validity of the period model with non-dissuasive counseling, based on the understanding that the Portuguese Constitution requires the state to protect both the intrauterine life and the reproductive autonomy of women.[52] The Portuguese Court has respected, since its early rulings, the discretion of the legislature to adopt alternative protective measures, where it considered penalization unnecessary, inadequate, or disproportionate. The Court held that, in a rule-of-law state, criminal law should remain a last resort, a *ultima ratio*.

As seen in section 3.2.2, which discussed the possibility of abortion in cases of anencephaly, there is a precedent from the Brazilian Supreme Federal Court (STF) regarding the decriminalization of abortion in a specific case: anencephaly. This was a case of constitutional control, interpretation in accordance with the Penal Code, and a balancing act with other fundamental constitutional rights. Examining the Penal Code to perform an interpretation in accordance with the Constitution, allowing for the expansion of abortion grounds, would be a measure inherent to the STF's competence, within the concentrated and abstract control of constitutionality. It would permit a balancing of the use of criminal law based on a criminological analysis, weighing fundamental rights, considering the right to life of the fetus in a progressive manner and the right to a dignified life of the pregnant woman, along with her other fundamental constitutional rights.

Carolina Alves de Souza Lima (2015) develops a thesis that the abortion of anencephalic fetuses would be constitutional, as it represents the regular exercise of a right. In this circumstance, when there is a collision of fundamental rights, the rights to the woman's health, freedom, reproductive autonomy, and the secular nature of the state should prevail over the right to life from conception, as

understood to be protected by the 1988 Federal Constitution. This is argued through the application of the principle of proportionality in the interpretation of the fundamental rights in question:

> Não atende ao princípio da proporcionalidade compelir uma mulher a gestar um ser anencéfalo, que não tem e nunca terá competência biológica para alcançar a condição de desenvolvimento humano.
> A permissão do aborto nos casos de anencefalia, desde que haja o consentimento da gestante, enquadra-se em uma hipótese de exercício regular de direito, causa excludente da ilicitude, conforme o inc. III do art, 23 do Código Penal. O aborto do anencéfalo configura direito constitucional de toda a mulher que se encontra nessa particular situação. Por isso, a penalização é de flagrante inconstitucionalidade, por violar os princípios de interpretação constitucional dos direitos fundamentais, em especial o princípio da proporcionalidade. (Lima, 2015, p. 214-215)

> It does not comply with the principle of proportionality to compel a woman to carry a pregnancy to term with an anencephalic fetus, which lacks and will never have the biological capacity to reach the condition of human development. Allowing abortion in cases of anencephaly, as long as there is the woman's consent, fits into a situation of exercising a right regularly, constituting an excludent of unlawfulness, as per Article 23, Inc. III of the Penal Code. The abortion of an anencephalic fetus represents a constitutional right for every woman in this particular situation. Therefore, penalizing such abortion is a clear unconstitutionality, as it violates the constitutional principles of fundamental rights interpretation, especially the principle of proportionality.

Baratta (2004, p. 299-333), when addressing the principles of Minimal Criminal Law, points out that the principle of abstract proportionality — according to which only serious violations of human rights can be subject to criminal sanctions —, the principle of suitability, and the principle of proportionality represent only a necessary condition, but not a sufficient one, for the imposition of penalties. It is necessary to prove, or be highly likely, that a useful effect will result from such penalties in situations where there is a grave threat to human rights. He also highlights the principle of subsidiarity, which holds that a penalty can only be imposed if it can be proven that there are no non-criminal methods of intervention capable of responding to situations where human rights are threatened, and that other modes of intervention with lesser social cost are unavailable.

The principle of proportionality is examined in detail by Undurraga (2016, p. 107-108) in the context of the constitutionality of abortion laws. She warns that judges often adopt categorical approaches, basing their judicial decisions on abstract moral and legal principles that rarely reflect the experiences of women or make intuitive assumptions without justification, particularly the assumption that criminalization is an effective method for protecting unborn life. These assumptions are often grounded in gender stereotypes that underestimate the effects of criminalization on women's lives.

It is the analysis of effectiveness that requires judges to consider the negative effects of criminalization and weigh them against the benefits attributed to it. Consequently, judges should consider alternative protective measures that might be equally effective but with fewer disadvantages. Proportionality requires that the benefits and costs associated with the protection of prenatal life be made explicit, and that questions be raised about how these costs are distributed.

The principles of "Minimal Criminal Law", used to justify minimal criminal intervention, closely resemble the Theory of Proportionality used by constitutionalists to assess the constitutionality of restrictions on fundamental rights. These are legal norms, often expressed in principles, that may conflict with or be restricted by the public authorities to achieve certain goals. Verifying the constitutionality of these restrictions or resolving conflicts in the application of fundamental rights in specific cases requires proportionality as an indispensable criterion.

Willis Santiago Guerra (2002)[53], when discussing the topic, points out that *princípios, por sua vez, se encontram em um nível superior de abstração, sendo igualmente hierarquicamente superiores, dentro da compreensão do ordenamento jurídico como uma pirâmide normativa* [principles, in turn, are at a higher level of abstraction, being equally hierarchically superior, within the understanding of the legal system as a normative pyramid]. If they do not allow a direct subsumption of facts, this happens indirectly, placing rules under their "scope of coverage." Unlike those, it is also noted that principles can contradict each other without causing any of them to lose their legal validity or be derogated

It is precisely in a situation where there is a conflict between principles or between them and rules that the principle of proportionality (in its strict or proper sense) shows its great significance, as it can be used as a criterion to resolve the conflict in the best way, optimizing by upholding one and disregarding the other.

The principle of proportionality has content that is divided into three "partial principles": the "principle of proportionality in the strict sense" or "maxim of balancing"; the "principle of adequacy"; and the "principle of necessity" or "mandate of the least restrictive means." According to the same author:

O "princípio da proporcionalidade em sentido estrito" determina que se estabeleça uma correspondência entre o fim a ser alcançado por uma disposição normativa e o meio empregado, que seja juridicamente a melhor possível. Isso significa, acima de tudo, que não se fira o "conteúdo essencial" de direito fundamental, com o desrespeito intolerável da dignidade humana, bem como que, mesmo em havendo desvantagens para, digamos, o interesse de pessoas, individual ou coletivamente consideradas, acarretadas pela disposição normativa em apreço, as vantagens que traz para interesses de outra ordem superam aquelas desvantagens. Os subprincípios da adequação e da exigibilidade, por seu turno, determinam que, dentro do faticamente possível, o meio escolhido se preste para atingir o fim estabelecido, mostrando-se, assim, "adequado". Além disso, esse meio deve se mostrar "exigível", o que significa não haver outro, igualmente eficaz, e menos danoso a direitos fundamentais. Sobre essa distinção, vale referir a formulação lapidar do Tribunal Constitucional alemão: "o meio empregado pelo legislador deve ser adequado e exigível, para que seja atingido o fim almejado. O meio é adequado, quando com seu auxílio se pode promover o resultado desejado; ele é exigível, quando o legislador não poderia ter escolhido outro igualmente eficaz, mas que seria um meio não-prejudicial ou portador de uma limitação menos perceptível a direito fundamental.

O "mandamento" ou "máxima da proporcionalidade", ao mesmo tempo em que ocupa o posto mais alto na escala dos princípios, por ser o mais abstrato deles, por resolver seus problemas de colisões, contempla igualmente a possibilidade de "descer" à base da pirâmide normativa, informando a produção daquelas normas individuais que são as sentenças e as medidas administrativas. Por tudo isso, bem como pela íntima relação que guarda com a "essência" ou "ideia do direito" — como já acentuou, entre outros, Karl Larenz —, é que se vê no princípio

da proporcionalidade a expressão mais própria da norma fundamental, a qual Kelsen nunca conseguiu definir de uma forma satisfatória, por só vislumbrá-la no topo de sua pirâmide normativa, quando o lugar mais acertado para um fundamento é mesmo na base de tal pirâmide. (Guerra, 2002, no page)

The "principle of proportionality in the strict sense" determines that a correspondence should be established between the goal to be achieved by a normative provision and the means used, which should be legally the best possible. This means, above all, that the "essential content" of a fundamental right is not violated, with the intolerable disrespect of human dignity, as well as that, even if there are disadvantages for, let's say, the interests of individuals or groups, caused by the normative provision in question, the advantages it brings to other interests outweigh those disadvantages. The sub-principles of adequacy and necessity, in turn, determine that, within what is factually possible, the chosen means must serve to achieve the established goal, thus being "adequate." Furthermore, this means must be "necessary," meaning that there is no other equally effective means that would be less harmful to fundamental rights.

Regarding this distinction, it is worth referring to the precise formulation of the German Constitutional Court: "The means employed by the legislator must be adequate and necessary to achieve the desired goal. The means is adequate when, with its help, the desired result can be promoted; it is necessary when the legislator could not have chosen another equally effective means that would be non-harmful or cause a less perceptible limitation to fundamental rights."

> The "mandate" or "maxim of proportionality," while occupying the highest position in the hierarchy of principles, as it is the most abstract, and resolving conflicts between principles, also contemplates the possibility of "descending" to the base of the normative pyramid, guiding the production of individual norms such as sentences and administrative measures. For all of this, as well as for its intimate relation to the "essence" or "idea of law" — as emphasized by Karl Larenz and others —, the principle of proportionality is seen as the most proper expression of the fundamental norm, which Kelsen never managed to define satisfactorily, as he only saw it at the top of his normative pyramid, when the most accurate place for a foundation is at the base of such a pyramid.

The use of proportionality in the criminalization of abortion, according to the criteria pointed out by Virgílio Afonso da Silva (2002), is characterized as a rule of proportionality, rather than a principle, as Guerra argued.

According to Silva (2002, p. 36), *adequado, então, não é somente o meio com cuja utilização um objetivo é alcançado, mas também o meio com cuja utilização a realização de um objetivo é fomentado* [appropriate, then, is not only the means by which a goal is achieved, but also the means by which the realization of that goal is promoted]. Here, the discussion is whether the criminalization of abortion is adequate, i.e., whether it can achieve the goal of preventing or minimizing the death of embryos, or even promoting their eradication or reduction, or achieving greater effectiveness in punishing such crimes. It is observed that this measure is of questionable adequacy in protecting the legal interest it aims to safeguard (the life of the fetus), as it does not have a significant impact on the number of abortions performed,

which continue to occur in the thousands, according to the research already cited in this book. The criminalization of abortion is not effective in preventing the death of the unborn but causes high maternal mortality or physical and psychological harm to women who seek abortions, which still occur clandestinely and in unsafe, risky ways. In examining adequacy, it is also necessary to ask whether there are equally effective, less intrusive measures to achieve the law's goal.

Laws that criminalize abortion with the aim of protecting an absolute right to the life of the fetus from conception, based on religious convictions, in a secular state, lack constitutional legitimacy. This goal to be achieved by the law becomes questionable. Furthermore, if the law criminalizing abortion penalizes the woman who performs self-abortion more severely than the third party who provokes it, on the grounds that her refusal to become a mother is more reprehensible, it would reinforce gender stereotypes, discrimination, and inequalities by imposing the role of mother and mandatory motherhood, thus violating the Constitution, which prohibits gender discrimination (Undurraga, 2016, p. 114).

The principle of suitability in the context of Minimal Criminal Law is similar to the subprinciple of adequacy, in that it would be necessary to prove, or at least make it highly probable, that some useful effect occurs regarding the protection of the embryo's life. It is also necessary to demonstrate the effectiveness of the criminalizing law, as more restrictive laws are not associated with lower abortion rates. Undurraga (2016, p. 115) reports that when analyzing the abortion situation in different regions of the world, it is concluded that the proportion of women living in more liberal abortion regimes is inversely proportional to abortion rates.

Regarding the subprinciple of necessity, Virgílio Afonso da Silva (2002, p. 36) teaches that: *Um ato estatal que limita um direito*

fundamental é somente necessário caso a realização do objetivo perseguido não possa ser promovida, com a mesma intensidade, por meio de outro ato que limite, em menor medida, o direito fundamental atingido [A state act that limits a fundamental right is only necessary if the achievement of the pursued objective cannot be promoted, with the same intensity, through another act that limits the affected fundamental right to a lesser extent.]. It is understood that, by criminalizing abortion, Criminal Law imposes mandatory motherhood on women, disrespecting a series of constitutional rights of women, who are constitutionally recognized as persons (lived lives).

If the state's goal is to prevent abortions, it can use means that are not as burdensome to women, such as preventing unwanted pregnancies through sex education, the distribution of contraceptives, and support for women who wish to have children but are in adverse circumstances. These would be less harmful means to women's rights. The pursued objective (preventing abortion and protecting the life of embryos) could be achieved in a way that is less damaging to the rights of women, which are violated by the criminalization of abortion.

Countries that adopt counseling, such as Germany (dissuasion counseling) and Portugal (informative counseling), consider this model, as a means of deterring abortion, to be more effective than criminalization. They argue that this counseling can offer women consistent alternatives for social support for motherhood, such as paid pre- and post-natal maternity leave, the availability of daycares, etc., and can prove to be much less invasive and restrictive of fundamental rights.

Finally, Virgílio Afonso da Silva (2002, p. 40) clarifies the subprinciple of proportionality in the strict sense:

> Ainda que uma medida que limite um direito fundamental seja adequada e necessária para promover um outro direito

fundamental, isso não significa, por si só, que ela deve ser considerada como proporcional. Necessário é ainda um terceiro exame, o exame da proporcionalidade em sentido estrito, que consiste em um sopesamento entre a intensidade da restrição ao direito fundamental atingido e a importância da realização do direito fundamental que com ele colide e que fundamenta a adoção da medida restritiva.

EVEN IF A MEASURE THAT LIMITS A FUNDAMENTAL RIGHT IS ADEQUATE AND NECESSARY TO PROMOTE ANOTHER FUNDAMENTAL RIGHT, THIS DOES NOT BY ITSELF MEAN THAT IT SHOULD BE CONSIDERED PROPORTIONAL. A THIRD EXAMINATION IS STILL NECESSARY — THE EXAMINATION OF PROPORTIONALITY IN THE STRICT SENSE. THIS CONSISTS OF A BALANCING BETWEEN THE INTENSITY OF THE RESTRICTION ON THE AFFECTED FUNDAMENTAL RIGHT AND THE IMPORTANCE OF REALIZING THE CONFLICTING FUNDAMENTAL RIGHT THAT JUSTIFIES THE ADOPTION OF THE RESTRICTIVE MEASURE.

Here, the balancing between the right to the progressing life of the embryo and the rights to lived life, dignity, freedom, autonomy, privacy, family planning, physical and mental health, and secularism must be considered. Protecting the life of the embryo absolutely would be proportional to the restrictions on all the aforementioned rights of women. The criminalization of abortion would be disproportionate in the strict sense, as the degree of restriction imposed on a range of constitutional rights of women would not be reasonable in terms of achieving the protection of life still in progress.

Ferrajoli (2003, p. 12) argues that the use of criminal law is only justified when it has the capacity to prevent harm to individuals without causing even more detrimental effects than those it aims to prevent. While it may be morally debatable whether the fetus is a person

deserving of criminal protection, it is certain that the prohibition of abortion and forced motherhood impose enormous costs on women and violate their constitutionally guaranteed rights, such as health (including mental health), freedom (autonomy), dignity, and equality.

Another point is whether penalizing abortions, even if considered immoral, would effectively prevent them. Based on more than 20 years of experience in Italy, the answer to this question would be negative: the prohibition of abortion did not succeed in preventing abortions, and these nearly halved after the abolition of the prohibitive law. In other words, the prohibition of abortion cannot be rationally invoked, not even to defend the life of the fetuses, as it does not magically equate to preventing abortions or protecting embryos, but rather leads to mass clandestine abortion.

In the same vein, Tessaro (2008, p. 2) argues:

> A ordem jurídica nacional protege a vida intra-uterina, entretanto, de forma mais débil do que a tutela assegurada à vida das pessoas nascidas. Outrossim, em situações particulares, é lícito que essa proteção ceda mediante uma ponderação de interesses, se configurado um conflito entre os direitos fundamentais da gestante e a vida dependente. Ademais por ser um processo gradual, a tutela da vida do nascituro é mais intensa no final do que no início da gestação, considerando o desenvolvimento fetal correspondente, devendo tal valor ter especial relevo na definição do regime jurídico do aborto.

> The national legal system protects intrauterine life; however, it does so in a weaker manner than the protection given to the life of individuals who have already been born. Moreover, in particular situations, it is lawful for this protection to yield through a balancing of interests

> when there is a conflict between the fundamental rights of the pregnant woman and the dependent life. Additionally, due to its gradual nature, the protection of the life of the unborn child is more intense towards the end of pregnancy than at the beginning, considering the corresponding fetal development. This value should be of particular importance in defining the legal framework for abortion.

Justice Barroso's vote (2016) in HC 124.306 applied the principle of proportionality to conclude the atypicality of the criminalization of abortion under the Brazilian Penal Code:

> A tipificação penal viola, também, o princípio da proporcionalidade por motivos que se cumulam: (i) ela constitui medida de duvidosa adequação para proteger o bem jurídico que pretende tutelar (vida do nascituro), por não produzir impacto relevante sobre o número de abortos praticados no país, apenas impedindo que sejam feitos de modo seguro; (ii) é possível que o Estado evite a ocorrência de abortos por meios mais eficazes e menos lesivos do que a criminalização, tais como educação sexual, distribuição de contraceptivos e amparo à mulher que deseja ter o filho, mas se encontra em condições adversas; (iii) a medida é desproporcional em sentido estrito, por gerar custos sociais (problemas de saúde pública e mortes) superiores aos seus benefícios.
>
> A gravidez, certamente, pode levar a condições mais acentuadas de dor e de tensão para a mulher e para a sua família. O nascimento de um filho acarreta impactos inevitáveis sobre as forças financeiras e à estrutura emocional dos pais. Bens juridicamente relevantes podem contrapor-se à continuidade da gravidez. A solução cabível haverá de ser, contudo a inexorável preservação da vida humana, ante a sua posição no ápice dos valores protegidos pela ordem

constitucional. Veja-se que a ponderação do direito à vida com valores outros não pode jamais alcançar um equilíbrio entre eles mediante compensações proporcionais. Isso porque, na equação dos valores contrapostos, se o fiel da balança apontar para o interesse que pretende superar a vida intrauterina o resultado é a morte do ser contra quem se efetua a ponderação. Perde-se tudo de um dos lados da equação. Um equilíbrio entre interesses é impossível de ser obtido. (Mendes & Branco, 2015, p. 262)

The criminalization also violates the principle of proportionality for several cumulative reasons: (i) it constitutes a measure of questionable adequacy to protect the legal interest it intends to safeguard (the life of the fetus), as it does not produce a significant impact on the number of abortions performed in the country, merely preventing them from being carried out safely; (ii) it is possible for the State to prevent abortions through more effective and less harmful means than criminalization, such as sexual education, distribution of contraceptives, and support for women who wish to have children but are in adverse conditions; (iii) the measure is disproportionate in a strict sense, as it generates social costs (public health issues and deaths) that outweigh its benefits.

Pregnancy can certainly lead to heightened conditions of pain and stress for the woman and her family. The birth of a child brings inevitable impacts on the financial strength and emotional structure of the parents. Legally relevant interests may be in opposition to the continuation of the pregnancy. However, the appropriate solution must be the inexorable preservation of human life, given its position at the pinnacle of the values protected by the constitutional order. It should be

noted that the balancing of the right to life with other values can never achieve a balance through proportional compensations. This is because, in the equation of opposing values, if the balance points to the interest that aims to overcome intrauterine life, the result is the death of the being against whom the balancing is carried out. Everything is lost on one side of the equation. A balance between interests is impossible to achieve.

Paradoxically, there are judicial decisions that apply the principle of proportionality both to decriminalize abortion and to defend its criminalization under the terms proposed by the current Penal Code:

> A sistemática do Código Penal representa uma adequada ponderação dos interesses em jogo, no sentido de que se atém aos parâmetros estabelecidos pela Constituição. Defende a vida do nascituro, sem esquecer também os direitos da mulher. Trata-se de uma opção que se acha dentro da esfera de discricionariedade do legislador. Importa ter em mente que, em matéria de hermenêutica constitucional, vige o princípio da presunção de constitucionalidade das leis e dos atos do Poder Público, derivado do cânone da separação de poderes. Isto significa que se deve presumir a constitucionalidade de um ato legislativo, de sorte que "os tribunais só declaram a inconstitucionalidade de leis quando esta é evidente, não deixa margem a séria objeção em contrário" (Carlos Maximiliano, Hermenêutica e Aplicação do Direito, 9ª edição, pág. 308). Em síntese: (i) a vida intrauterina é um bem jurídico protegido pela Constituição Federal; (ii) o que a faz um bem passível de ser tutelado pelo Direito Penal; (iii) o legislador ordinário, ao criminalizar o aborto no Código Penal, atuou nos limites de sua discricionariedade, promovendo um sopesamento

dos direitos e interesses em jogo que não agride aos cânones constitucionais; fez, em outras palavras, uma opção legítima; (iv) de sorte que cabe ao Poder Judiciário respeitar a escolha levada a efeito pelo Poder Legislativo. Frente a este quadro, não é o caso de se declarar a incompatibilidade do Código Penal, no ponto em que institui o crime de aborto, com a Constituição Federal. 2. O trancamento da ação penal, pela via de "habeas corpus", constitui medida excepcional, reservada para as hipóteses em que avultar, de forma manifesta, a falta de justa causa, a atipicidade da conduta ou a extinção da punibilidade, considerando os limites estreitos de cognição do "writ". Situação não configurada. Ordem denegada. (Habeas Corpus nº 2188903-92.2017.8.26.0000, da Comarca de Ourinhos, Rel. Des. Laerte Marrone, j. 23/11/2017). (São Paulo, 2017a, no page)

The system established by the Penal Code represents an adequate balancing of the interests at play, in the sense that it adheres to the parameters set by the Constitution. It defends the life of the fetus, without neglecting the rights of the woman. This is an option that falls within the discretionary power of the legislator. It is important to bear in mind that, in matters of constitutional hermeneutics, the principle of the presumption of constitutionality of laws and acts of the Public Power prevails, derived from the canon of the separation of powers. This means that the constitutionality of a legislative act should be presumed, so that "courts only declare the unconstitutionality of laws when it is evident and leaves no room for serious objection" (Carlos Maximiliano, Hermeneutics and Application of Law, 9th edition, p. 308). In summary: (i) intrauterine life is a legal interest protected by the Federal Constitution; (ii) this makes it a legal interest that can be protected by criminal law; (iii) the ordinary legislator, by criminalizing abortion in the Penal Code, acted within the limits of

> its discretion, promoting a balancing of rights and interests at play that does not violate constitutional principles; in other words, it made a legitimate choice; (iv) therefore, it is up to the Judiciary to respect the choice made by the Legislative Power. In light of this, there is no need to declare the incompatibility of the Penal Code, in the part where it establishes the crime of abortion, with the Federal Constitution. 2. The dismissal of the criminal case, through a "habeas corpus," constitutes an exceptional measure, reserved for situations in which the lack of probable cause, the absence of the crime, or the extinction of the punishability are clearly evident, considering the narrow scope of review of the "writ." This situation is not configured. The order is denied. (Habeas Corpus No. 2188903-92.2017.8.26.0000, from the District of Ourinhos, Reporting Judge: Des. Laerte Marrone, judgment of 23/11/2017).

I sought to demonstrate that the criminalization of abortion in Brazil violates the Federal Constitution, requiring an interpretation in accordance with the Constitution to allow it, as well as proportionality and the proportional use of Criminal Law.

However, decriminalization alone is not enough.

The secondary criminalization of abortion in Brazil, marked by the penal selectivity of targeting poor, Black, and less educated women, shows that decriminalization is not sufficient to combat this selectivity. Although these women would no longer be criminally persecuted, removed from the stigma of criminal prosecution, bad legal records, clandestinity, or being seen as immoral, sometimes "murderers," selfish, promiscuous, or unnatural, they will still lack the financial means to pay for a safe abortion in a hospital setting performed by healthcare professionals.

Moreover, since abortion is considered a woman's health issue, a public health matter, a fact in the reproductive life and family

planning of many women, and an exercise of reproductive rights, it should be attended to and regulated by the SUS (Unified Health System), considering that health is a fundamental social right and of universal access, according to the 1988 Federal Constitution.

As Silvia Pimentel rightly highlights (2007, p. 162):

> Admitindo-se que o aborto não é um bem em si mesmo, admitindo-se a dignidade humana e os direitos fundamentais da mulher, admitindo-se que a vida do feto, em geral, deve ser protegida e admitindo-se que a educação e a prevenção na área da sexualidade e da reprodução é comprovadamente a única política pública que apresenta resultados satisfatórios para diminuir a incidência do aborto, conclui-se que a legislação (normatização) por parte do Estado, que vise a diminuir a realização de abortamentos, deve ser preventiva e não punitiva. Importa descriminar para não discriminar. Importa deslocar o tratamento jurídico do campo do direito penal para o da educação e da saúde pública.

> Assuming that abortion is not a good in itself, assuming human dignity and the fundamental rights of women, assuming that the life of the fetus, in general, should be protected, and assuming that education and prevention in the areas of sexuality and reproduction are proven to be the only public policy that yields satisfactory results in reducing the incidence of abortion, it is concluded that legislation (norm-setting) by the state aimed at reducing the occurrence of abortions should be preventive and not punitive. It is important to decriminalize to avoid discrimination. It is important to shift the legal treatment from the field of criminal law to that of education and public health.

It will then be up to the Ministry of Health to establish the technical guidelines for care, considering any legislation to be developed, while respecting the constitutional rights related to the issue and the terms of judicial decisions that may be issued in the context of abstract constitutional control.

3.5.1 Interpretation in accordance with the Constitution and proportionality to determine the unconstitutionality of the criminalization of abortion until the first trimester of pregnancy: Habeas Corpus 124.306/RJ and Claim for non-compliance with fundamental precept – ADPF 442

On November 29, 2016, the First Panel of the Federal Supreme Court (STF), in the judgment of Habeas Corpus 124.306/RJ (Brazil, 2016), following the opinion of Justice Roberto Barroso, lifted the preventive detention of two defendants (employees of an illegal abortion clinic in Rio de Janeiro), charged by the Public Prosecutor's Office of the State of Rio de Janeiro for the alleged crime of abortion with the woman's consent and formation of a criminal gang (articles 126 and 288 of the Penal Code).

According to the opinion of Justice Luís Roberto Barroso, which prevailed with the majority, in addition to the absence of the requirements that would justify preventive detention, the criminalization of abortion would be incompatible with several fundamental rights, including sexual and reproductive rights, the autonomy of women, the physical and mental integrity of the pregnant woman, and the principle of equality.

In the Habeas Corpus, the defense argued that the necessary requirements for preventive detention were not present because the defendants had no prior criminal records, had stable jobs, and resided

at fixed addresses. It also argued that the measure was disproportionate, as any potential conviction could be served in an open prison.

Justice Barroso presented his opinion in the sense of not admitting the Habeas Corpus (HC), as it was a substitute for an appeal, but granting the order *ex officio*, extending it to the co-defendants. Justices Edson Fachin and Rosa Weber followed this understanding, and Justice Luiz Fux granted the Habeas Corpus *ex officio*, limiting himself to revoking the preventive detention.

In examining the matter, Justice Barroso emphasized that it would be necessary to assess the constitutionality of the criminal provision applied to the defendants. According to the justice, the legal interest being protected (the potential life of the fetus) is "evidently relevant" (Brazil, 2016), but the criminalization of abortion before the first trimester of pregnancy violates several fundamental rights of women, in addition to insufficiently observing the principle of proportionality. Among the legal interests violated, he pointed out the autonomy of women, the right to physical and mental integrity, women's sexual and reproductive rights, gender equality – as well as social discrimination – and the disproportionate impact of criminalization on poor women.

He advised, however, that this was not an argument in favor of promoting the procedure, "pelo contrário, o que se pretende é que ele seja raro e seguro", and he added:

> O aborto é uma prática que se deve procurar evitar, pelas complexidades físicas, psíquicas e morais que envolve. Por isso mesmo, é papel do Estado e da sociedade atuar nesse sentido, mediante oferta de educação sexual, distribuição de meios contraceptivos e amparo à mulher que deseje ter o filho e se encontre em circunstâncias adversas. (Brazil, 2016, no page)

Abortion is a practice that should be avoided due to the physical, psychological, and moral complexities it involves. For this reason, it is the role of the State and society to act in this regard, through the provision of sexual education, distribution of contraceptive methods, and support for women who wish to have the child and find themselves in adverse circumstances.

For the Justice, it is necessary to interpret, in accordance with the Constitution, Articles 124 to 126 of the Penal Code — which define the crime of abortion — in order to exclude from its scope the voluntary interruption of pregnancy performed in the first trimester.

In summary, Justice Roberto Barroso decided that:

> 3. Em *segundo lugar*, é preciso conferir interpretação conforme a Constituição aos próprios arts. 124 a 126 do Código Penal – que tipificam o crime de aborto – para excluir do seu âmbito de incidência a interrupção voluntária da gestação efetivada no primeiro trimestre. A criminalização, nessa hipótese, viola diversos direitos fundamentais da mulher, bem como o princípio da proporcionalidade.
> 4. A criminalização é incompatível com os seguintes direitos fundamentais: *os direitos sexuais e reprodutivos da mulher*, que não pode ser obrigada pelo Estado a manter uma gestação indesejada; a *autonomia* da mulher, que deve conservar o direito de fazer suas escolhas existenciais; a *integridade física e psíquica* da gestante, que é quem sofre, no seu corpo e no seu psiquismo, os efeitos da gravidez; e a *igualdade* da mulher, já que homens não engravidam e, portanto, a equiparação plena de gênero depende de se respeitar a vontade da mulher nessa matéria.
> 5. A tudo isto se acrescenta o impacto da criminalização sobre as mulheres pobres. É que o tratamento como crime, dado pela lei penal brasileira, impede que estas mulheres, que não

têm acesso a médicos e clínicas privadas, recorram ao sistema público de saúde para se submeterem aos procedimentos cabíveis. Como consequência, multiplicam-se os casos de automutilação, lesões graves e óbitos.

6. A tipificação penal viola, também, o princípio da proporcionalidade por motivos que se cumulam: (i) ela constitui medida de duvidosa adequação para proteger o bem jurídico que pretende tutelar (vida do nascituro), por não produzir impacto relevante sobre o número de abortos praticados no país, apenas impedindo que sejam feitos de modo seguro; (ii) é possível que o Estado evite a ocorrência de abortos por meios mais eficazes e menos lesivos do que a criminalização, tais como educação sexual, distribuição de contraceptivos e amparo à mulher que deseja ter o filho, mas se encontra em condições adversas; (iii) a medida é desproporcional em sentido estrito, por gerar custos sociais (problemas de saúde pública e mortes) superiores aos seus benefícios.

7. Anote-se, por derradeiro, que praticamente nenhum país democrático e desenvolvido do mundo trata a interrupção da gestação durante o primeiro trimestre como crime, aí incluídos Estados Unidos, Alemanha, Reino Unido, Canadá, França, Itália, Espanha, Portugal, Holanda e Austrália.

8. Deferimento da ordem de ofício, para afastar a prisão preventiva dos pacientes, estendendo-se a decisão aos corréus. (Brazil, 2016, no page, emphasis added)

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3. Secondly, it is necessary to interpret, in accordance with the Constitution, Articles 124 to 126 of the Penal Code — which define the crime of abortion — in order to exclude from its scope the voluntary interruption of pregnancy performed in the first trimester. Criminalization, in this case, violates several fundamental rights of the woman, as well as the principle of proportionality.

4. Criminalization is incompatible with the following fundamental rights: the woman's sexual and reproductive rights, as she cannot be forced by the state to continue an unwanted pregnancy; the woman's autonomy, which must preserve her right to make existential choices; the physical and psychological integrity of the pregnant woman, who suffers the effects of pregnancy on her body and psyche; and gender equality, as men do not become pregnant and, therefore, full gender equality depends on respecting the woman's will in this matter.

5. In addition, there is the impact of criminalization on poor women. The criminal treatment given by Brazilian law prevents these women, who do not have access to private doctors and clinics, from seeking public health services for the necessary procedures. As a result, cases of self-harm, serious injuries, and deaths multiply.

6. The criminalization also violates the principle of proportionality for several reasons: (i) it is a measure of questionable adequacy for protecting the legal good it aims to safeguard (the life of the fetus), as it does not have a significant impact on the number of abortions performed in the country, only preventing them from being done safely; (ii) it is possible for the state to prevent the occurrence of abortions through more effective and less harmful means than criminalization, such as sex education, the distribution of contraceptives, and support for women who wish to have children but are in adverse circumstances; (iii) the measure is disproportionate in the strict sense, as it generates social costs (public health problems and deaths) that exceed its benefits.

7. Lastly, it is worth noting that virtually no democratic and developed country in the world treats the interruption of pregnancy during the first trimester

as a crime, including the United States, Germany, the United Kingdom, Canada, France, Italy, Spain, Portugal, the Netherlands, and Australia.

8. Granting of the order ex officio, to lift the preventive detention of the defendants, extending the decision to the co-defendants.

The decision issued in HC 124.306/RJ was limited to examining the preventive detention of the defendants in that specific case, without addressing the position of the woman who underwent the abortion, nor the criminal merits of the case. The focus was solely on the preventive detention, which was revoked based on the main argument of the unconstitutionality of the criminalization of abortion until the first trimester of pregnancy, in line with other countries that have decriminalized abortion.

The reporting justice understood that if the criminal act was tainted by unconstitutionality, there would be no just cause to maintain the preventive detention. In other words, one cannot be detained preventively for an act that is not considered typical due to a violation of the Constitution and the principle of proportionality. This decision applied only *inter partes* and remains isolated within the scope of the STF. As demonstrated by the research conducted, few abortion cases result in legal proceedings, and even fewer reach the STF through diffuse constitutional review with such an innovative thesis.

The arguments used by the justices were repeated in *Arguição de Descumprimento de Preceito Fundamental* - ADPF 442, which seeks to decriminalize abortion with *erga omnes* effect.

On March 6, 2017, the Socialism and Liberty Party (PSOL) filed ADPF 442 with the STF, requesting a constitutional interpretation of articles 124 and 126 of the Penal Code to declare their partial non-reception. The goal was to exclude voluntary abortion performed in

the first 12 weeks of pregnancy from their scope, as these provisions are deemed incompatible with the dignity of the human person, women's citizenship, and the promotion of non-discrimination. Additionally, it argues that these provisions violate fundamental rights such as the right to life, liberty, physical and psychological integrity, gender equality, prohibition of torture or inhumane treatment, health, and family planning. The aim is to guarantee the constitutional right of women to voluntarily terminate a pregnancy according to their autonomy, without requiring specific state permission, and to allow health professionals to perform the procedure.

It is important to note that the ADPF 442 request is for the partial non-reception of articles 124 and 126 of the Penal Code, as the permissive provisions in the Code, such as the criminalization of abortion performed against the woman's will, are deemed constitutional.

The ADPF author contends that the STF has already established premises and a line of reasoning consistent with the request, based on previous rulings (anencephaly, stem cells, and the revocation of preventive detention in abortion cases – specifically: ADPF 54, ADI 3.510, and HC 124.306). The author acknowledges that abortion is a "difficult case" due to its moral appeal, but argues that it is part of women's reproductive life and that criminalizing it lacks constitutional reasonableness. The author requests the STF to address the unconstitutionality of abortion criminalization in light of human dignity, connected to essential constitutional rights and the proportionality test.

Justice Rosa Weber, the reporting justice, called for a public hearing on August 3 and 6, 2018, to hear researchers, religious authorities, scientists, activists, parliamentarians, doctors, sociologists, theologians, etc. Some had registered in advance, while others were invited to contribute with their experiences to the case's judgment, ensuring proportional representation of those against and those in

favor of the request in ADPF 442. Many *amicus curiae* petitions have been submitted, and many voices will be heard during the process. As of now, there is no scheduled date for the judgment of ADPF 442.

This book engages with the arguments presented in ADPF 442, which include the unconstitutionality of abortion criminalization, the need for constitutional interpretation of the Penal Code, and the application of proportionality to allow abortion. It also argues that restrictions can be imposed as pregnancy progresses but always excluding criminalization in cases where there is a risk to the woman's life or health, sexual violation, or severe malformation incompatible with life outside the womb.

Existing abortion laws tend to follow several models: the repressive model (where no abortion is allowed), the indication model (abortion is permitted to save the woman's life, or in cases of risk to physical or mental health, in cases of rape, etc.), the period model (such as within 12 weeks), sometimes with only informational counseling (with or without a waiting period for the procedure), and others with dissuasive counseling (to discourage abortion). These models may sometimes combine.

Sabadell and Dimoulis (2008, p. 331) also list a *modelo de autodeterminação da gestante* [self-determination model] that would fully guarantee the woman's self-determination, preventing state intervention and privatizing the abortion issue by leaving the decision to the pregnant woman herself. The authors note that they are unaware of any country that has fully liberalized voluntary abortion without establishing time limits or other conditions.

It is important to highlight the existence of these models, as various regulations are possible. This book defends the unconstitutionality of such restricted criminalization as currently present in Brazil's Penal Code.

In HC 124.306, Justice Barroso deemed the criminalization of abortion until the first trimester unconstitutional. ADPF 442 seeks the same outcome. Carpizo (2015, p. 55) lists 33 countries that permit abortion up to

12 weeks of pregnancy upon request by the woman. Some countries have limits of 10, 16, or even 24 weeks, while a few do not impose limits.

The argument here is that there is legislative room for regulation that respects the Federal Constitution and proportionality, as outlined here. In ADPF 442, the request is for a constitutional interpretation to set a 12-week limit, which is accepted in most countries. However, would this remain consistent with the Federal Constitution of 1988 if the limit were 10, 16, or 24 weeks? This is a matter that could be subject to future constitutional review, should federal legislation regulating abortion be enacted. This has already occurred with other Constitutional Courts, such as those in the United States, Germany, and Portugal. As abortion laws evolve, new constitutional reviews become possible. What the STF must do is provide constitutional boundaries, such as the fact that voluntary abortion cannot be criminalized until the first trimester because it violates the 1988 Federal Constitution.

The argument is made that the STF should, when necessary, play a counter-majoritarian role in defending fundamental rights that might be violated by the Legislative Branch, even if the legislation conflicts with the Constitution and restricts, oppresses, or discriminates against vulnerable or minority groups. Women face a vulnerable social situation regarding the exercise of their reproductive rights, particularly with the criminalization of abortion. Therefore, even if a majority of the population or legislative body believes in or defends the criminalization of abortion in all cases (or even advocates for stricter laws), the STF's role will always be to protect the Constitution, even against the parliament.

This task would not violate the principle of separation of powers. This is the teaching of Ferrajoli (2006, p. 94), who distinguishes between two types of discretion: "political" discretion, which pertains to governmental

functions, and "legislative and judicial" discretion, which is tied to the interpretative and probative activities required in applying legal norms to specific cases. These are two fundamentally distinct types of discretion that come from different sources of legitimacy: political representation in the first case, and adherence to the law in the second. To assume that "reasonable controversies" regarding the meaning of applicable norms should be resolved by a majority of legislators, rather than judges, and that the "final word" on them belongs to the political community, would be to reject the principle of separation of powers and fail to understand the difference between legislation and jurisdiction, between the legislative and judicial branches. Everything would be lost, as Montesquieu wrote, if the judicial power were united with the legislative power. The separation and independence of the judiciary from the legislative and executive branches ensure its cognitive role, so that a judgment is valid and just not because it is desired and shared by a political majority but because it is based on correct findings of fact and law.

In other words, if the STF were to decide against the current public opinion regarding the criminalization of abortion or the views of the Brazilian Legislative Branch, it would not be violating the separation of powers but rather upholding it. The legitimacy of its decisions comes not from the desires of the majority but from adherence to the law (in this case, adherence to the 1988 Federal Constitution).

Thus, the request made in ADPF 442 regarding the decriminalization of abortion fits within the institutional structure of the STF's counter-majoritarian role in safeguarding fundamental rights. However, legislative regulation is still needed regarding the model to be adopted, and the Legislative Branch could play a role in reconciling opposing positions by adopting decriminalization models that minimally respect the defense of intrauterine life and the dignity of women, their autonomy, health, reproductive rights, privacy, and freedom.

Furthermore, the Judiciary, in fulfilling its constitutional duty, and the Legislative Branch, should they regulate abortion decriminalization, must implement and apply international human rights norms in this regard. This issue will be examined in the next section.

3.6 THE NECESSARY REVISION OF BRAZILIAN LAWS ON THE CRIMINALIZATION OF ABORTION ARISING FROM INTERNATIONAL HUMAN RIGHTS TREATIES AND INTERNATIONAL REGULATIONS[54]

Brazil is primarily part of two major international communities: the United Nations (UN) and the Organization of American States (OAS). Consequently, its membership entails adherence to an international normative system that binds member states, resulting in multilateral obligations both within the global system (UN) and the regional system (OAS).

Within the UN, the aftermath of World War II brought Human Rights back to the forefront as a crucial component of the new framework for International Law. The *Charter of the United Nations* (UN, 1945), in its preamble, reaffirmed faith "in the equal rights of men and women," and included, among the UN's purposes, the promotion of friendly relations among nations "based on respect for the principle of equal rights" and the enjoyment of the rights proclaimed therein "for all without distinction as to race, sex, language, or religion [...]" as provided in Articles 1-3, 13, 55, and 76 "c".

At this initial stage, there was no intention to define, even minimally, the content or scope of the principle of equality between

men and women. Its inclusion in the Charter was derived from the impact of atrocities committed by regimes whose policies emphasized supposed differences among peoples, the inequity among human beings, and the existence of superior and inferior races — therefore inherently unequal[55].

Shortly thereafter, the "Universal Declaration of Human Rights" (UN, 1948)[56], emerged, complementing, on a global scale and as an instrument of general protection, what is commonly referred to as the "legislative phase." This phase was primarily concerned with establishing fundamental international normative standards to govern relations between states in the post-war period. As its name suggests, the document aimed to enshrine the Fundamental Rights of individuals rather than impose obligations on states or establish mechanisms for monitoring their actions.

It can be observed a significant evolution in the concept of equality, beginning with the Charter of 1945 and its affirmation of the fundamental identity of all human beings from birth, grounded in reason. This approach revitalized classical natural law concepts concerning the universality of Human Rights.

It is evident that the Universal Declaration connected fundamental rights with popular sovereignty and the notion of a Democratic State by affirming, in Article I, that all human beings are born free and equal in dignity and rights (UN, 1948). This statement definitively rejected formulas based on traditional or charismatic authority, or any other purportedly foundational element of state power.

Furthermore, Article II, paragraphs 1 and 2 of the Declaration (UN, 1948), seeks to broadly extend the legal capacity of individuals to enjoy the rights established therein. However, this effort arguably results in an ineffective generalization, as there are circumstances

in which it is lawful to discriminate among the recipients of the law or the protection of the state.

Nevertheless, the Declaration made considerable progress by identifying numerous instances where states are prohibited from discriminating. It frequently employs terms such as "all" and "no one", for example: *Ninguém será mantido em escravidão ou servidão* [No one shall be held in slavery or servitude], *Ninguém será submetido a tortura* [No one shall be subjected to torture], and *Toda pessoa tem direito à liberdade de locomoção* [Everyone has the right to freedom to come and go][57] (ONU, 1948).

By prescribing this, the Declaration established the limits for social coexistence and state action in an absolute manner, without any distinction. It is not so much the conceptualization of the principle of equality, but the acceptable limits to inequality.

The Declaration, at no point, asserts that human beings should remain in a state of absolute equality in rights and obligations throughout their lives, or even that the state should contribute to this. It simply sets the positive and negative boundaries to the inequality inherent in the human condition, especially in relation to the State, since its presupposition of existence is the general agreement of wills under equal conditions, from which it naturally follows that the state cannot treat citizens unequally, for better or for worse.

The United Nations only perfected the International Human Rights Protection System in 1966 with the adoption of two major Covenants: the "Covenant on Civil and Political Rights" and the "Covenant on Economic, Social and Cultural Rights." At this historical moment, the protection of individuals was still "general" and "abstract," without taking into account their specificities and particularities. The "specification" of the rights holder and the particularized protection of women emerged within the United Nations only a decade later, with the "Convention on the Elimination of All Forms of Discrimination

Against Women" in 1979. This Convention faced significant resistance from the vast majority of UN member countries.

Within the scope of human rights, the Convention on the Elimination of All Forms of Discrimination Against Women was, among the UN conventions, the one that received the most reservations from the countries that ratified it.[58] In other words, the international system for the protection of women's rights is not immune to gender discrimination within itself.[59]

In 1993, at the World Conference on Human Rights in Vienna, the women's movement raised the banner of struggle: "women's rights are also human rights," as reflected in the "Vienna Declaration and Programme of Action" (section 18), which affirmed that "the human rights of women and girls are inalienable and constitute an integral and indivisible part of universal human rights" (UN, 1993).

This was the first time that, in an international forum, it was recognized that women's rights are human rights (Gilbert, 1997, p. 177). This recognition was also revisited during the fiftieth anniversary of the Universal Declaration of Human Rights (1948).

As the most recent international instrument, the International Convention on the Elimination of All Forms of Discrimination against Women brought significant progress to the UN's regulation of equality issues.

Firstly, in its Preamble (UN, 1979), the Convention recalls that discrimination, in addition to violating the fundamental equality between human beings,

> is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the

> potentialities of women in the service of their countries and of humanity [...].

Thus, discrimination is seen as harmful not only to women (the primary beneficiaries of the norms) but to the entire global community, broadening the concept of human rights to something that concerns everyone, as it is no longer possible to treat fundamental rights regarding social coexistence separately, given that the greater goals of life on Earth (peace, happiness) depend on protecting each group or individual.

Another notable advancement relates to the degree of state commitment to protecting and promoting rights, such as the inclusion in a country's constitution of a ban on discrimination, or effective access to courts to ensure rights.

Going further, Article 5 requires the State to take measures to:

> a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women, and b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases. (UN, 1979)

In summary, this modern instrument for the protection of human rights implies decisive state intervention to correct distortions, adopting a clearly different stance from that which led to the promulgation of the Universal Declaration of Human Rights just 31 years earlier.

Furthermore, it advocates for affirmative measures to promote equality between men and women, changing discriminatory sociocultural patterns, eliminating the trafficking of women, the exploitation of prostitution, and ensuring women's political participation, nationality, education, work, health, legal capacity, and equality in the exercise of their legal rights regarding family life.

Compliance by State Parties with all these obligations set out in the CEDAW Convention is monitored by the Committee on the Elimination of Discrimination against Women — the CEDAW Committee, as it is known. This represents a mechanism for access to the global system, the UN, as outlined by the Convention itself in Article 17 (UN, 1979). It is made up of 23 independent experts, elected by a plenary session from each State Party, through a secret ballot from a list of candidates nominated by the countries.

The Committee receives periodic reports submitted by State Parties, accounting for their activities. These are studied and analyzed, after which States are invited to participate in a public session of the Committee for an entire day, engaging in a constructive dialogue on priority issues. As the climax of the process, the Committee sends its Final Observations to each State that is under analysis, recommending specific attention and actions to be taken concerning the most problematic aspects of the situation of women in each country.

The Committee also examines communications submitted by individuals or groups of individuals who bring to its attention violations of rights guaranteed by the Convention. This mechanism was established by the Optional Protocol to the CEDAW Convention, adopted on October 6, 1999.

The Optional Protocol thus creates mechanisms to ensure the implementation of the Convention, providing the possibility for specific reparations in individual cases. It also allows the Committee

to emphasize the need for the adoption of effective remedies at the national level in general (ONU, 1999).

Among these mechanisms are, in addition to individual communications, investigations initiated when the Committee receives reliable information regarding grave and systematic violations of the rights of women guaranteed in the Convention, committed by action or omission of the State.

Based on repeated decisions made in the context of Final Observations, individual and group communications, and investigations, the Committee develops General Recommendations (GRs), which aim to interpret, update, and contextualize the rights and obligations established in the CEDAW Convention, as a way to encourage and facilitate its compliance by State Parties.

The Committee develops the General Recommendations (GRs) based on its own experience, especially from the analysis of the reports it receives, which allow the identification of the most common difficulties in understanding and implementing the text of the CEDAW Convention by the governments preparing the reports.

This means that the GRs are developed from the increasingly creative and constructive dynamics of the human rights treaty bodies and the United Nations system as a whole – including, among others, Conferences and Special Rapporteurs' Reports. The global social dynamics, with its factual and value-driven transformations, receive attention and space in the GRs of the Human Rights Committees, which allow for an expansion of the interpretative possibilities of international human rights protection norms[60].

The topic of abortion is not explicitly present in the CEDAW Convention in its articles, although there is no doubt that the protection of women's health, which is explicitly established,

encompasses the issue of abortion as it is a public health matter that affects thousands of women worldwide[61].

However, through the work of the CEDAW Committee, especially the development of General Recommendations (GRs), the topic has been debated and addressed.

GR No. 19, from 1992, states that violence against women is a form of discrimination that severely impedes the enjoyment of rights and freedoms on an equal footing with men. GR No. 19 further clarifies that the definition of discrimination in Article 1 of the CEDAW Convention includes violence based on sex, that is, violence directed at women because they are women or that disproportionately affects them.

The Committee found that the periodic reports from States Parties did not always appropriately reflect the close link between discrimination against women, violence against women, and violations of human rights and fundamental freedoms. Thus, the full implementation of the Convention would require countries to adopt measures to eliminate all aspects of violence against women.

GR No. 19, from 1992, expressly states in Article 22: *A esterilização e o aborto obrigatórios afectam a saúde física e mental das mulheres e violam o seu direito de decidirem o número e o espaçamento entre as suas crianças* [Forced sterilization and abortion affect the physical and mental health of women and violate their right to decide the number and spacing of their children] (UN, 1992, p. 276). It also establishes the following specific recommendations:

> m) Os Estados Partes devem assegurar que sejam tomadas medidas para prevenir a coerção no que respeita à fertilidade e à reprodução e assegurar que as mulheres não sejam forçadas a procedimentos médicos inseguros, como o aborto ilegal,

> devido à falta de serviços apropriados no que toca ao controle da fertilidade. (ONU, 1992, p. 277–278)

> m) State parties should ensure that measures are taken to prevent coercion concerning fertility and reproduction and ensure that women are not forced into unsafe medical procedures, such as illegal abortion, due to the lack of appropriate services regarding fertility control.

It is noted, by the CEDAW Committee, the concern in establishing a right to family planning, in the sense that a woman should be able to decide whether she wants to have children or not, as well as the spacing between them, considering a situation of violence and discrimination the inability to exercise this right, due to the lack of appropriate services in terms of fertility control. States must adopt measures to prevent any coercion in the exercise of this right, so that women are not forced to seek risky procedures and illegal abortions.

The recent General Recommendation No. 35, from 2017, on gender-based violence against women, updating General Recommendation No. 19/1992, deepens this discussion and establishes that

> 18. Violations of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment. (UN, 2017)

In General Recommendation No. 35 (2017), the CEDAW Committee explicitly states that the criminalization of abortion and the forced continuation of a pregnancy constitute gender-based violence, and depending on the circumstances, may even amount to cruel treatment and be equated with torture.

In its 2012 Final Observations[62] on Brazil's report, the CEDAW Committee stated.:

> Saúde
> 28. O Comitê reconhece que os serviços de saúde do país estão em expansão e que o Estado implementou uma série de medidas destinadas a reduzir a taxa de mortalidade materna, tais como a criação do programa "Rede Cegonha" (2011). No entanto, assinala que esse programa pode não abordar suficientemente todas as causas de mortalidade materna, por se concentrar apenas em serviços de cuidados às mulheres grávidas. Lamenta que as mulheres que se submetem a um aborto ilegal continuem a enfrentar sanções criminais no Estado-Parte e que o gozo da saúde sexual e reprodutiva das mulheres e dos seus direitos esteja sendo prejudicado por uma série de projetos de lei em análise no Nacional Congresso, como a Lei n º 478/2008 (Estatuto do Nascituro). O Comitê é ainda mais preocupado com a feminização da infecção pelo HIV/AIDS.
> 29. O Comité insta o Estado-parte a: a) continuar seus esforços para aumentar o acesso das mulheres aos cuidados de saúde e monitorar e avaliar a implementação do programa "Rede Cegonha" visando a reduzir efetivamente a taxa de mortalidade materna, em particular, no âmbito grupos de mulheres desfavorecidas; b) Agilizar a revisão da legislação que criminaliza o aborto, a fim de eliminar as disposições punitivas impostas às mulheres, como já recomendado pelo Comitê (CEDAW/C/BRA/CO/6, parágrafo 3.); e colaborar com

todos os intervenientes na discussão e análise do impacto do Estatuto do Nascituro, que restringe ainda mais os já estreitos motivos existentes que as mulheres façam abortos legais, antes da aprovação pelo Congresso Nacional do Estatuto do Nascituro. (CEDAW/C/BRA/CO/7, 2012, s/p)

Health. 28. The Committee acknowledges that the country's healthcare services are expanding and that the State has implemented a series of measures aimed at reducing maternal mortality rates, such as the creation of the "Rede Cegonha" program (2011). However, it notes that this program may not sufficiently address all causes of maternal mortality, as it focuses only on services for pregnant women. It regrets that women who undergo illegal abortions continue to face criminal sanctions in the State Party and that the enjoyment of women's sexual and reproductive health and rights is being undermined by a series of bills being considered in the National Congress, such as Bill No. 478/2008 (the Statute of the Unborn Child). The Committee is even more concerned with the feminization of HIV/AIDS infection.

29. The Committee urges the State Party to:

a) Continue its efforts to increase women's access to healthcare and monitor and evaluate the implementation of the "Rede Cegonha" program, with the aim of effectively reducing the maternal mortality rate, particularly among disadvantaged groups of women;

b) Expedite the review of the legislation that criminalizes abortion, in order to eliminate the punitive provisions imposed on women, as already recommended by the Committee (CEDAW/C/BRA/CO/6, paragraph 3); and collaborate with all stakeholders in discussing and

> analyzing the impact of the Statute of the Unborn Child, which further restricts the already narrow grounds under which women may seek legal abortions, prior to the approval of the Statute by the National Congress. (CEDAW/C/BRA/CO/7, 2012, no page)

The Committee observes that it has been recommending to Brazil a review of the Penal Code with respect to the criminalization of abortion, and expresses concern over the existence of legislative bills currently under consideration that, instead of revising the criminalization, would further restrict abortion. This represents a step backward in light of international recommendations.

Furthermore, at the international level, the Cairo Declaration (International Conference on Population and Development, 1994 – ICPD) states that abortion should not be promoted as a method of family planning in any case (ONU, 1994).

As Piovesan (2007, p. 60) explains, the 1994 Cairo Conference on Population and Development established important ethical principles regarding reproductive rights, affirming the right to have control over sexual and reproductive health as a fundamental right. Women have the individual right and social responsibility to decide on exercising motherhood.

However, it was only at the International Women's Conference in Beijing, 1995 (section 106, "k") (ONU, 1995), that further progress was made, with all governments being urged to strengthen their commitment to women's health; to address the effects of abortions performed in inadequate conditions as an important public health issue; to reduce reliance on abortion by providing broader and improved family planning services; and, ultimately, to consider

the possibility of reforming laws that impose punitive measures on women who have undergone illegal abortions.

The Committee on Economic, Social and Cultural Rights (CESCR) also recommended that Brazil review its criminalizing abortion legislation, addressing it as a serious public health problem. The Committee recommended allowing abortion without restrictions (Piovesan, 2007, p. 62).

Similarly, the UN Human Rights Committee stated in 2005 that denying access to legal abortion is a violation of the woman's most basic rights (Piovesan, 2007, p. 63).

On October 30, 2018, the UN Human Rights Committee approved General Comment No. 36 on the right to life, which stated that States must facilitate access to abortion to protect the life and health of women:

> 8. Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. For example,

> they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers to effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls who seek abortion. States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances and on a confidential basis. (UN, 2018)

Finally, the precedents of the European Court of Human Rights (ECHR) emphasize that the fetus does not hold an absolute right to life that supersedes the rights of the woman. The Court has recognized that laws permitting abortion do not violate Article 2 of the European Convention, which protects the right to life (Piovesan, 2007, p. 64).

In this context, it can be argued that Brazil, as part of the International Human Rights Protection System, has an explicit commitment to the decriminalization of abortion

FINAL CONSIDERATIONS

E, hoje, temos falado: um debate respeitoso sobre o aborto exige também sutileza intelectual, delicadeza de espírito, altruísmo e generosidade.

And, today, we say: a respectful debate on abortion also requires intellectual subtlety, delicacy of spirit, altruism, and generosity.

Silvia Pimentel, *Gênero e direito*

Throughout the development of this book, it became clear that the issue is not about being for or against abortion. However, people invariably feel compelled to take one of the sides in the debate and see each other as enemies, with no willingness to listen to one another. As Dworkin (2003, p. VIII) states in the preface to his work *Domínio da Vida: aborto, eutanásia e liberdades individuais*, how can one hope to dialogue with people willing to shoot doctors in front of abortion clinics?

How can one dialogue with those who treat women who have abortions as cruel murderers of defenseless fetuses?

The preface author of this book, Silvia Pimentel, would say: with *sutileza intelectual, delicadeza de espírito, altruísmo e generosidade* [intellectual subtlety, delicacy of spirit, altruism, and generosity].

Given the challenge, efforts were made to write this work and produce a scientific discourse that is, at the same time, human—raising hypotheses, formulating questions, seeking methodology and readings, while never forgetting the women being spoken about: their stories, their pain, their choices, their fears, and their anguish, which emerged in the hundreds of police inquiries and legal cases studied.

This book argues that the criminalization of abortion in Brazil violates the Federal Constitution of 1988, discriminates against women, and does not meet the proportionality required for such a significant restriction of women's fundamental constitutional rights. The decriminalization and regulation of abortion are compatible with protecting the fetus's right to life, provided that this right is not understood as absolute and the secular nature of the state is respected.

In addressing the right to life established in the Federal Constitution of 1988, it was concluded that it is not an absolute right. Although life is protected from conception by the American Convention on Human Rights, this protection is qualified by the phrase "in general," which was included precisely to allow for permissive abortion legislation. The moment life should be protected and the way it should be protected are political decisions, choices that are not dictated by biology or religion but by law.

The criminalization of abortion violates the human dignity of women and the related constitutional rights related to it: liberty, self-determination, diversity, privacy, intimacy, reproductive health, and family planning. It is the mission of the Supreme Court to ensure the realization of these rights through constitutional review, providing an interpretation in line with the Constitution. This role does not

violate the constitutional principle of the separation of powers, as the judiciary's countermajoritarian function includes protecting fundamental rights through constitutional review.

This is a role that several constitutional courts worldwide have fulfilled since the 1970s.

The criminalization of abortion also violates the International Human Rights Protection System, which has clear directives concerning Brazil's obligation to decriminalize abortion.

The criminalization of abortion does not pass the test of proportionality: it is not adequate, necessary, or strictly proportional. Criminalization does not prevent abortions, which continue to occur at significant rates, and it does not protect fetal life. Instead, it results in women's deaths and irreparable harm due to unsafe and clandestine procedures. There are less restrictive means that would protect fetal life more effectively, such as sexual education, access to family planning methods, social policies, and support for motherhood, among others. In short, there are no positive impacts of abortion prohibition that justify it.

The criminalization of abortion is selective toward poor, black, and low-educated women, causing additional pain and suffering beyond the abortion itself. Furthermore, it demonstrates extremely low efficacy as a secondary deterrent, as shown by empirical research conducted in the First Jury Tribunal of São Paulo.

Finally, it was observed that the criminalization of abortion stems from a legal framework that remains patriarchal, sexist, and masculinist, using abortion laws as a way to control women's sexuality and bodies.

As Marcia Tiburi (2014) puts it, some argue that abortion is a matter of the embryo's "life" rather than the "life," "body," or desires of women. In doing so, they attempt to portray abortion as a general issue, rather

than one that concerns real women — historical and political beings — and the pregnant woman who is not respected as an individual in her human singularity. The supposed desire to be a mother is constantly juxtaposed with the "unthinkable" desire not to be one.

A woman who does not wish to be a mother must "pay criminally" for her refusal.

Decriminalizing abortion means allowing women to make their moral choices with autonomy and responsibility.

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NOTES

1 All reports of abortions mentioned in the epigraphs of the chapters in this book occurred between 1990 and 2012. They were processed before the First Jury Court of São Paulo's Capital and were extracted from case files. The names are fictional, but the stories are true. They reveal the pain and suffering inflicted by the criminalization of abortion on hundreds of women "selected" by the penal system: the most vulnerable ones.

2 Danda Prado (2007, p. 13–16) states that abortion is currently one of the most explosive words in our everyday language, laiden with taboos and prejudice. After analyzing the term across various dictionaries, including those in other languages, the author clarifies that termination of pregnancy is the correct term used in medical circles, whereas abortion is a colloquial corruption of the word. Drezett and Pedroso (2012, p. 35) note that the World Health Organization (WHO) clinically defines the termination of pregnancy as the interruption of pregnancy up to the 22nd week, with the product of conception weighing less than 500 grams. In this book, the commonly used term "abortion" has been adopted, even when referring to the process of termination of pregnancy, without making a distinction.

3 The controversy surrounding the issue is evident in public opinion surveys. A headline from the newspaper Folha de São Paulo on August 22, 2018, stated that the majority of Brazilians remain opposed to the legalization of abortion, according to data obtained by the Data Folha Institute. The article, despite the headline, revealed that, in fact, the proportion of people supporting the maintenance of the current laws had decreased from November 2015 to the date of the survey, dropping from 67% to 59%. This indicates a decline in the number of people who believe abortion should remain criminalized. However, the majority still oppose legalization, as 59% of respondents argue that abortion should be criminalized, except in the cases permitted by the Penal Code. The publication Mulheres Brasileiras e Gênero nos Espaços Público e Privado (2010) presents a survey in which 2,365 women and 1,181 men from 25 states were interviewed. Among the women, 30% believe that those who have an abortion should not be punished, while 48% think they should be; 32% favor prison or other severe punishment, and 17% support other punishments

instead of imprisonment. Among the men interviewed, 23% believe that women who have an abortion should not be punished, while 52% think they should be; 37% favor prison or other severe punishment, and 15% support other punishments instead of imprisonment.

4 The portion concerning the application of questionnaires led to the article titled "Itineraries and Methods of Legal Abortion in Five Brazilian Capitals" (DINIZ; MEDEIROS, 2012). This part of the research showed that most of the women interviewed had undergone only one abortion, but one in four had two abortions, and one in seventeen had three abortions. The majority of the abortions occurred among young women up to 19 years old, many of whom already had children. There is a prevalence of abortions among Black women. The primary abortion method is a combination of herbal teas and "citotec" (misoprostol), with the procedure being finalized in hospitals. This was the qualitative stage of the National Abortion Survey (PNA).

5 At the public hearing held on August 3, 2018, by the Federal Supreme Court (STF) in the context of ADPF 442, numerous disputes arose regarding the data presented during various speeches. This was particularly evident following the presentations by the representative of the Ministry of Health and the author of the National Abortion Survey (PNA), who was also referenced in several other speeches. The representative of the Ministry of Health emphasized that the burden of voluntary pregnancy termination in Brazil is very high, with an estimated nearly one million unregulated procedures occurring annually. These procedures are conducted clandestinely and, in most cases, unsafely. Unsafe procedures result in the hospitalization of more than 250,000 women each year, approximately 15,000 complications, and 5,000 cases of severe hospitalization, leaving women on the brink of death. This scenario caused the death of 203 women due to unsafe abortion procedures in 2016 (one death every two days), totaling over 2,000 maternal deaths in the past 10 years. In 2016, two deaths from abortion occurred every two days, predominantly affecting young, Black women with low levels of education (Brazil, 2018b, p. 18).

6 Although medical literature distinctly names the various stages of intrauterine life, using the term "embryo" to refer to the product of conception up to the 8th week of gestation and "fetus" from the 9th week onward, for the purposes discussed and developed throughout this work, such terminological precision is deemed unnecessary. Both terms are used interchangeably to refer to the unborn being. Accordingly, the definitions are as follows: "Embryo: the human being in its early stages of development, that is, from the end of the second week to the end of the eighth week, when general morphogenesis is completed. [...] Fetus: the human organism in development, from the ninth week of gestation until birth" (Zago & Covas, 2006, p. 18–19).

7 Abortion is considered unsafe when performed in precarious sanitary conditions and/or by unqualified individuals (Drezett & Pedroso, 2012, p. 35).

8 Saffioti (1999, p. 157) argues that the primary manifestation of the concept of gender lies in the idea that it is necessary to learn to be a woman, as femininity is not determined by biology or simply by anatomy but is constructed by society. Evidently,

Beauvoir did not have access to the arsenal of concepts and theories available today, but she undoubtedly addressed the essential point. It took three decades from the first formulation of the concept of gender to build this theoretical body. In the conference "O Segundo Sexo à luz das teorias feministas contemporâneas" (The Second Sex in Light of Contemporary Feminist Theories), delivered in Bahia in 1999 to celebrate the 50th anniversary of the book, Saffioti deepens this analysis, exploring various aspects of Beauvoir's work.

9 The original was published in 1975 as: The Traffic in Women: Notes on the "Political Economy" of Sex. *In* Reiter, Rayna (ed.). *Toward an Anthropology of Women*. New York: Monthly Review Press. For the writing of this work, the pioneering 1993 translation by the SOS Corpo organization from Recife was used, which is a mimeographed text. In 2017, the Ubu publishing house published a translation for the first time in Brazil. "'Traffic in Women' originated in the early days of the second wave of feminism, when many of the women who had been active in the late 1960s were trying to come up with an idea of how to think about and understand the oppression of women" (Rubin, 2003, p. 157). In 2011, 36 years after the publication of this text, Gayle Rubin published Deviations, through Duke University Press, where she compiled several of her previously published works from the last 40 years, including "The Traffic," offering new reflections on it, calling them "The Trouble with Trafficking in Women." In this article, the author (2011, p. 86) draws attention to the problem with the title of her article published in 1975, using the term "traffic," which is associated with the international trafficking of women for prostitution purposes. She highlights that when the article was published in France, the word "traffic" was changed to "transactions," precisely because of this frequent association, and emphasizes that she did not write about the trafficking of women in that more common sense of the term and does not adopt the persistent contemporary confusion between trafficking and prostitution. On the contrary, she opposes it. From this point, the article addresses this specific theme. She mentions that in 1975, when she wrote and published The Traffic, she never imagined, not even in her worst nightmares, that the term would become associated with the crusade against prostitution at the end of the 20th century. Nor did she anticipate that part of the feminist movement would unite with anti-feminist conservatives and evangelical groups under the banner of fighting human trafficking and criminalizing or abolishing prostitution instead of advocating for better economic conditions for women and social power. She also says that she could never have dreamed that anyone would think that the article's title pointed to anti-prostitution laws, and if she had imagined these possibilities, she would have diligently sought out another title for her article.

10 Joan Scott explicitly critiques Gayle Rubin's idea by pointing out that some researchers, particularly anthropologists, have reduced the use of the gender category to the kinship system (focusing on the domestic sphere and family as the foundation of social organization). However, Scott argues that a broader perspective is needed, one that includes not only kinship but also (particularly for complex modern societies)

the labor market (a sexually segregated labor market is part of the gender construction process), education (socially masculine educational institutions, whether single-sex or coeducational, are part of the same process), and the political system (universal male suffrage is part of the gender construction process). According to the author, it makes little sense to limit these institutions to their functional utility for kinship systems or to claim that contemporary relationships between men and women are products of earlier kinship systems based on the exchange of women. Gender is constructed through kinship, but not exclusively; it is also constructed in the economy, in political organization, and, at least in current society, operates largely independently of kinship. However, it is worth noting that the critique of Gayle Rubin seems unfair, considering that Scott herself acknowledges that gender is constructed through kinship, and given that Gayle Rubin does not use only the kinship system for understanding the gender category but also psychoanalysis and Marxism.

11 The January 2017 special edition of the National Geographic Brasil magazine addressed what it called "The Gender Revolution." The magazine presented a glossary of 26 terms that aim to redefine "gender," including agender, androgynous, gender binary, cisgender, gender conformist, neutral spectrum, gender expression, gender fluidity, genderqueer, gender identity, gender nonconformist, intersex, LGBTQ, non-binary or neutral language, gender marker, non-binary gender, sexual orientation, pronouns (e.g., todxs, amigues, menines - In recent years, some Portuguese speakers, especially within activist and academic circles, have adopted gender-neutral language as an alternative to the traditionally gendered grammatical structure of the language. Unlike English, which has widely accepted neutral terms such as *they/them*, Portuguese nouns and adjectives typically reflect a binary system (*amigos/amigas*, *todos/todas*, *meninos/meninas*). To create neutral forms, some speakers replace gendered endings with alternatives like "-e" (*amigues*, *menines*) or non-standard symbols like "x" (*todxs*). However, these forms remain largely informal and are not recognized by official language authorities.), queer, biological sex, puberty suppression, transsexual, and transgender. The magazine stated that gender is an amalgamation of various elements: chromosomes (X and Y), anatomy (internal sexual organs and external genitalia), hormones (relative levels of testosterone and estrogen), psychology (the gender identity assumed by the individual), and culture (gender behavior defined by society). Sometimes, individuals born with the chromosomes and genitalia of one sex realize they are transgender, meaning that, in terms of gender identity, they feel more aligned with the opposite sex — or, in some cases, with no specific gender at all.

12 In the article *Ontogênese e filogênese do gênero*, Saffioti (2009b, p. 21) emphasizes that she understands gender as far broader than patriarchy, insofar as patriarchy involves hierarchical relationships among socially unequal beings, while gender also encompasses egalitarian relationships. Thus, patriarchy represents a specific instance of gender relations. Consequently, patriarchy qualifies gender — patriarchal order of gender.

13 Reading Vladimir Safatle's afterword in Judith Butler's Giving an Account of Oneself offers valuable insights into Butler's theory of deconstructing the notion of gender as identity. While recognition theory emphasizes the possession of identity, including gender and sex, queer theory introduces the concept of gender dispossession.

14 Translator Note (NT): The term "travesti" in Latin America, particularly in Brazil, refers to a specific transfeminine identity that is distinct from both cisgender women and binary trans women. Travestis often undergo body modifications, such as hormone therapy and surgeries, but do not necessarily identify within the male-female binary as understood in Western trans narratives. The term carries a strong sociopolitical significance, as travestis have historically faced high levels of discrimination, marginalization, and violence while also being key figures in LGBTQ+ activism. Unlike the English word "transvestite", which has fallen out of common use and often carries outdated connotations, "travesti" remains a self-identification term with deep cultural and political meaning.

15 Author's Note: when a person lives in alignment with their biological sex and their gender identity, they are referred to as cisgender.

16 Bittencourt (2017, p. 122) highlights that the discourse of the Schools without Ideology movement deliberately conflates partisanship with politics, aiming precisely to strip the educational sphere of the essential analysis of concrete political praxis. The Schools without Ideology project, which claims to fight against the manifestation of ideologies in education, is itself ideological.

17 Its founder is said to be Miguel Francisco Urbano Nagib, who identifies himself as the coordinator of the movement, whose website is www.escolasempartido.org.

18 See: Carnio (2009), Albagnano (2007), Mautner (2011) and Stoppino (2008–2010).

19 This topic has already been addressed in some previous papers. In this book, it is explored in greater depth and analyzed in light of the constitutional duty to decriminalize abortion.

20 It is important to note that there are movements of Catholic and Evangelical women advocating for the decriminalization of abortion, as well as members within the church itself. During the public hearing convened by Minister Rosa Weber, rapporteur of ADPF 442, on August 3 and 6, 2018, some religious figures expressed support for the decriminalization of abortion. Among them were Maria José Rosado Nunes, director of the organization Catholics for the Right to Decide; Lutheran pastor Lusmarina Campos Garcia from the Institute of Religious Studies; and Rabbi Michel Schlesinger, however less directly than the first two. Pastor Lusmarina stated that the state must not confuse crime with what is considered sin. She added that the Bible does not condemn abortion and highlighted that the most significant religious argument against abortion—the commandment "Thou shalt not kill"—was not universally applied in the Bible, as it allowed for killing foreigners, adulterous women, and enemies. She argued that linking abortion to this commandment is a manipulation of the biblical text. Maria José pointed out that many Catholic women undergo abortions and emphasized that poor women are the ones who suffer

most from the consequences of clandestine procedures. "We cannot continue to turn a blind eye to this reality. The Constitution must be upheld, and religion must welcome rather than judge" (2018a). In 2018, an Evangelical Women's Front in favor of abortion decriminalization was established.

21 The same study also notes that there is significant cohesion in the behavior of politicians belonging to the Frente *Parlamentar Evangélica* [Evangelical Parliamentary Front]. They are supported by a qualified staff that assists them in their daily work in the National Congress, providing information, maintaining connections with their constituencies, organizing meetings, and engaging in dialogue with judges, ministers, and government secretaries.

22 The research *Religião e Política* [Religion and Politics] (Vital & Lopes, 2012, p. 169) offers an insightful analysis of the ambiguity between secular and confessional state in Brazil, noting that, from a strictly legal perspective, Brazil has been a secular state since the first republican constitution (1891), as is extensively mentioned in several works addressing the issue of religion in the public space in the country. However, in practice, one finds situations that contradict this principle, such as the funding of religious activities with public resources (such as shows, walks, etc.), the presence of religious symbols and rituals in the Legislative, Executive, and Judicial branches, the hiring of confessional religious education teachers, and more. Similarly, in another extensive work analyzing secularism and reproductive rights for women, *Laicidad y derechos reproductivos de las mujeres en la jurisdicción constitucional latinoamericana*, Alberto Abad Suárez Ávila (2015, p. 5) affirms that although there is a formal separation in Latin American countries, many principles of the Catholic religion remain embedded in Positive Law, in areas such as family roles, marriage, divorce, sexual diversity, abortion, etc., due to the region's predominantly Catholic nature.

23 Jorge Miranda (1993, p. 355) also provides a schematic framework for the relationships between the state and religious confessions, as revealed by history and Comparative Law. The author envisions the possibility of identification between State and religion, in which case the State would be confessional, where there may be either the dominance of religious power over political power (theocracy) or the dominance of political power over religious power (caesaropapism); non-identification (secular state), where there may be union between the State and a religious confession (state religion) or separation, with the separation being either relative (with special, privileged treatment of one religion) or absolute (with equality among religious confessions); and, finally, opposition of the State to religion, which may be relative (secularist state) or absolute (atheist state – or of negative confessionalism).

24 Many constitutional law books and manuals were consulted in the preparation of this book, as these works are typically the initial and basic references for undergraduate students or those preparing for public exams. No discussions were found addressing the correlation between constitutional law on life, abortion, and constitutional rights related to the decriminalization of abortion in the following works: Lenza (2013); Bonavides (1996); Temer (1993); Teixeira (1991); Bastos (1999); Ferreira Filho (2015).

25 Sonia T. Felipe and Fabíola de Castro Cardoso (2010a, 2010b) addressed this issue from a bioethical perspective in two articles discussing the moral status of humans in embryonic and fetal states, analyzing both the conservative and liberal positions. the authors base their analysis on the thoughts of four key scholars. The conservative position regards abortion as equally immoral as the killing of adult humans. this argument is grounded in the principle of potentiality, asserting that every living human being is a person with potential. according to this view, all humans — adults, embryos, fetuses, and newborns — share the same 46 chromosomes. In contrast, the liberal position defines a person as a moral agent capable of taking responsibility for their actions in accordance with secular morality. Becoming a person, according to this perspective, requires the development of one's own moral authority.

26 In January 1977, the president of Catholics for Christian Political Action filed a petition with the Inter-American Commission on Human Rights against the United States of America and the state of Massachusetts. The person whose rights were allegedly violated was referred to as "Baby Boy," the name by which the case became known. The pregnant individual was a 17-year-old teenager. It was claimed that the victim (Baby Boy) had been killed by the abortion process performed at a Boston hospital, in violation of the right to life set forth in the American Declaration of the Rights and Duties of man and the right to life from conception, in general, as outlined in the American Convention on Human Rights. The doctor who performed the abortion was initially convicted of manslaughter and then, on appeal, was acquitted by the Supreme Judicial Court of Boston. The petitioner argued that the U.S. Supreme Court's decision (Roe v. Wade) in 1973, which allowed abortion, violated the American Declaration of Human Rights. it was also argued that the fetus was about six months old and, therefore, under the u.s. supreme court's decision, a "protectable exception" would apply, as there was extrauterine viability. In the report from the Inter-American Commission, the tensions between states during the drafting of the "right to life" in the american declaration of human rights were thoroughly explained. It was noted that in the initial document, which served as the basis for the discussion, the life of the unborn was consciously and deliberately protected, since there were countries in the region that allowed abortion under certain circumstances (protection of the health and life of the pregnant woman, sexual violation, economic reasons). These countries wanted to maintain their domestic laws, which would violate the international document if the right to life was protected to that extent. The same debate, with the same reasons, occurred during the drafting of the American Convention on Human Rights, which adopted the protection of life from conception with the clause "in general," allowing for the conventionality of permissive abortion laws to varying degrees. In other words, neither the American Declaration of Human Rights nor the American Convention on Human Rights ever intended to prohibit abortion in the region's countries or even to state that the right to life would be an absolute right. The final decision in the Baby Boy case was that the United States had not violated the American

Declaration of Human Rights. It should be noted that the U.S. did not ratify the American Convention, so it was not bound by this treaty, which was set aside by the Inter-American Commission on Human Rights (OAS, 1981, our translation).

27 Judgment of November 28, 2012. Andrea Barreto (2017), in a paper that analyzes the impact of the Case Artavia Murillo v. Costa Rica (which deals with the prohibition of fertilization in vitro in Costa Rica) on the right to abortion, emphasizes the interpretation of the Inter-American Court regarding the right to life provided for in the Inter-American Convention on Human Rights, as it was concluded that the protection of the unborn is different from the protection of the born individual, that women's rights must be taken into account when analyzing this protection and that the Court has openly opposed norms that absolutely prohibit abortion, as they do not make a balancing judgment between the gradual and incremental protection of life and the rights of pregnant women

28 For an alternative reading, refer to the work *Inviolability of the Right to Life* organized by Ives Gandra da Silva Martins and Paulo de Barros Carvalho (2013) in their various articles. Specifically, Martins (2013, p. 13) is mentioned, who offers an interpretation of the American Convention on Human Rights without acknowledging that the protection of the right to life from conception is "in general" and omits the fact that the term "in general" was deliberately included by countries to allo abortion in their domestic legislation. He also fails to mention the interpretation by the Inter-American Commission and the Inter-American Court regarding the right to life, understanding it as not absolute and the need for balancing in order to protect the rights of the pregnant woman.

Also referenced in the same work is an article by Fernandes (2013, p. 82–84), who cites biblical passages to argue that abortion has always been punished. The author further mentions that clandestine abortion serves a specific group of women who do not want their pregnancy to become public, for various reasons: they are married and pregnant from extramarital relations, they are daughters of wealthy people and fear damaging their public image, or they do not want to face long waiting lines in hospitals, among others. Essentially, the articles in the book defend an absolute right to life from conception and treat the issue of abortion as "anticipation of death," labeling women who undergo abortion as murderers.

29 In this regard, the article by Reva B. Siegel (2016) addresses the influence of the U.S. and German decisions on the Constitutional Courts of Mexico, Ireland, Spain, Colombia, and Portugal.

30 See the documentary *Roe vs. Wade: Women's Rights in the United States* (2018), which portrays the entire political struggle from 1973, when the Roe v. Wade decision was made by the U.S. Supreme Court, to the present day, where there is a strong polarization between those in favor of and those against abortion in the U.S. The documentary shows the intense battle to increasingly restrict abortion possibilities within the limits permitted by the Supreme Court's decision, through state laws regulating abortion access. Since 2010, over 300 restrictions on abortion have been passed. Before

1960, abortion was illegal in the U.S. The case brought to the Supreme Court involved a pregnant woman from Texas who wanted to have an abortion for financial reasons. The documentary demonstrates how the debate became politicized, with support for pro-choice not always aligning with being a Democrat. Several Republicans, before the intense polarization, were pro-choice, but due to pressure from Christian groups, they shifted to a pro-life stance. In the 1980s, the debate became partisan with the goal of obtaining votes from Christian voters. In 1992, the case *Planned Parenthood v. Casey* redefined *Roe v. Wade* by adopting the 'undue burden' standard, validating various restrictions such as waiting periods between requesting and performing an abortion, and informed consent that was designed to dissuade women from seeking an abortion. During the Clinton era, from 1992 onward, the anti-abortion movement coined the term 'late-term abortion' or 'partial-birth abortion' as a strategy to shock public opinion, arguing that abortions were being performed with fully developed fetuses very close to birth, as the *Roe v. Wade* decision allowed for abortions even in the third trimester for health reasons or to save the life of the mother. The pro-choice movement countered that 90% of abortions were performed within the first trimester, 9% before 20 weeks, and about 1% after 21 weeks. With increasingly restrictive laws creating more hurdles for women to access abortions and for clinics to operate, many clinics have closed, and many women now have to travel hundreds of miles to receive care. One example in the documentary cites a location in Texas where the nearest clinic is 350 kilometers away.

31 Many legal scholars argue that the answer lies in the natural sciences—biology—requiring only that the law ratify what is established there. However, Sabadell and Dimoulis (2008, pp. 338–339) contend that, although many authors reference the biological concept of life, such claims lack biological grounding. Biology describes the characteristics and functions of specific cells under particular circumstances. Deciding whether these functions and characteristics correspond to the concept of protected life does not fall within the scope of biology. For instance, life is also present in a sperm cell, which may lead to the birth of a human being if a certain sequence of events occurs. The same applies to a fertilized egg at any stage of its development. The decision to protect cells as life from a specific stage of development can only depend on a legal assessment.

Furthermore, it is important to note that no brain activity exists during the initial weeks of gestation. This creates a contradiction between the (sublegal) criteria of conception or implantation currently used in Brazil and the criterion adopted by the legislature to determine the end of life—brain activity. Law No. 9,434, of February 4, 1997, which regulates the removal of post-mortem organs, establishes brain death as the temporal criterion, to be confirmed in accordance with procedures defined by the Federal Medical Council. If the legislature considers that human life does not exist without brain activity, authorizing the removal of organs from a body that still has vital functions, how can one argue that a biologically equivalent form of life is protected within the uterus?

32 The 1830 Criminal Code did not even consider the act of self-induced abortion as a crime, but only criminalized the person who performed the abortion on the pregnant woman.

33 For a more detailed view of how the issue of abortion has been addressed in germany since the 1970s from a constitutional perspective, and how solutions and models have evolved, including after the reunification of germany, refer to Sabadell & Dimoulis (2008, pp. 332–335).

34 For a deeper study of the constitutional principle of human dignity, refer to the work *Dignidade da pessoa humana: conteúdo, trajetórias e metodologia* by Daniel Sarmento (2016). Also noteworthy is the extensive article "Vida digna: direito, ética e ciência" by Cármen Lúcia Antunes Rocha (2004, pp. 22 and 26), which does not take a definitive stance on the issue of abortion but acknowledges the humanity of the embryo while questioning whether it constitutes a person from a constitutional perspective:

"The embryo is a being. One does not merely 'exist as' an embryo. It is. Nor could its humanity be questioned, as it is undeniable. What is debated is its personality, meaning its recognition as a person under the law. [...] The right to a dignified existence also broadens the constitutional understanding of the concept of being, for there is a being from the moment of conception. However, this alone does not resolve the grave issue of abortion, as there is an interconnection of existences — mother and embryo — at the moment of conception and in the immediate period that follows. What the law needs to resolve — and each legal system addresses it in its own way, according to the idea of justice embraced by its people — is how this tapestry of intertwined lives, even physically, should be regarded, cared for, guaranteed, and respected in their condition of full dignity when circumstances dictate that one infringes upon or limits the dignity of the other."

35 T.N.: The term "depositário fiel" is a legal concept in Brazilian law referring to an individual or entity entrusted with the safekeeping of an asset under a legal obligation to maintain its integrity and return it in the same condition. The depositário fiel or custodian is legally responsible for preserving the asset and may face civil and criminal liability if they fail to do so.

36 Luigi Ferrajoli (1999, p. 78) asserts that the principle of equality, as proclaimed in the Declaration of Rights of 1789 and later in all constitutional charters, allows for a completely different interpretation, despite the symbolic male-centric representation in its origins. It is understood not as a descriptive thesis but as a normative principle; not as an assertion, but as a prescription; not in terms of what is, but in terms of what ought to be. Equality is not a fact but a value—not a statement, but a normative prescription precisely because, descriptively, it is recognized that human beings are diverse, and the aim is to prevent these differences from becoming factors of inequality.

37 The women who prepared for and attended the Vienna Conference carried the slogan as their rallying cry: "Without women, rights are not human rights." The Latin American and Caribbean Committee for the Defense of Women's Rights (Cladem), a non-governmental organization, is credited with coining the phrase

38 According to the Ministry of Health, the PAISM (Programa de Assistência Integral à Saúde da Mulher or Program for Comprehensive Women's Health Care) was developed by the Ministry of Health and presented to the Joint Parliamentary Commission of Inquiry (CPMI) on the population explosion in 1983. The discussion predominantly centered on birth control. The Ministry of Health played a fundamental role, influencing the Federal Government, which took a stance in favor of the free will of individuals and families regarding decisions about when to have children, how many to have, and the spacing between them.

This historic document incorporated feminist ideals into comprehensive health care, holding the Brazilian State accountable for aspects of reproductive health. As a result, priority actions were defined based on the needs of the female population, breaking away from the maternal and child care model previously implemented. As a philosophical and political guideline, PAISM also adopted the guiding principles of the health reform movement, such as decentralization, hierarchization, regionalization, equity in care, and social participation. Additionally, it proposed more equitable relationships between health professionals and women, emphasizing empowerment, autonomy, and greater control over health, the body, and life

The program encompassed care at all stages of life, including gynecological and clinical care, reproductive health (family planning, pregnancy, childbirth, and postpartum care), and treatment of chronic or acute diseases. The concept of care recognized the importance of medical attention and the health team while placing significant value on educational practices as a strategy to foster women's critical thinking and autonomy.

In 2003, work began on developing the National Policy for Comprehensive Women's Health Care – Principles and Guidelines. The women's health technical team evaluated the progress and setbacks achieved during the previous administration. In May 2004, the Ministry of Health launched the "National Policy for Comprehensive Women's Health Care – Principles and Guidelines" (Brazil, 2004), built on the SUS (Unified Health System) framework and aligned with the characteristics of the new health policy.

39 According WHO data, unsafe abortion is the fourth leading cause of maternal mortality worldwide and the fifth leading cause in Brazil, accounting for 11% of maternal deaths. According to the Ministry of Health, in 2013, abortion accounted for 4% of maternal mortality in the country.

40 Art. 124: *Aborto provocado pela gestante ou com seu consentimento* [Abortion performed by the pregnant woman or with her consent] (Brazil, 1940).

41 Justice luís roberto barroso refers to a passage from Justice Carlos Ayres Britto's statement in ADPF54-MC (judgment on 10.20.2004).

42 Tiburi (2014, p. 165, emphasis added in the original) exposes the relationship between the criminalization of abortion, which serves more to punish women for not wanting to be mothers than to protect the life of the embryo: "There are those who argue that abortion is a matter of the embryo's 'life' and not a matter of the 'life,' 'body,' or desires of women and of the woman herself. By appealing to the embryo,

they attempt to frame abortion as a general issue rather than one that pertains to women as historical and political subjects, and to the pregnant woman as an individual who is not acknowledged in her human singularity, except through the identity of sanctified maternity in progress. At this point, the anti-abortion discourse disguises itself as a discourse 'of the good' because it claims to defend 'life,' while in reality, it virulently targets the potency of female desire, attempting to control it. In this context, the supposed desire to be a mother is always pitted against the 'unthinkable' desire not to be a mother. The latter is positioned within moralistic culture as a form of negative impropriety for which women must be punished (and for which many feel self-inflicted guilt). A woman who does not wish to be a mother—whether through her outright refusal to procreate, or because of ignorance, lack of preparation, error, or accident that leads her to need an abortion—must symbolically pay for her refusal. The anti-abortion discourse demands this symbolic payment, making it a violent imperative.]

43 There is no need to even resort to extreme examples of ineffective means. Often, the ingestion of other medications, whether with the intention to provoke abortion or not, is mentioned in legal cases, where it cannot be proven that the ingestion of a particular medication caused the abortion. Sometimes, this is compounded by the woman's denial, who states that she took the medication for other purposes, also making it difficult to prove that the abortion was self-induced, as found in cases analyzed in the research.

"Lúcia had an abortion in her own home after feeling abdominal cramps. She was undergoing prenatal care and had gone to the doctor days before complaining of cramps, and was prescribed Buscopan. A neighbor, to whom she called for help because she was bleeding heavily, called the police. All the testimonies (from the neighbor, father, and the woman) confirm the story, but the Public Prosecutor's Office requested complete medical records from the hospitals she attended. In addition to submitting the records, the director of the Health Unit was also heard. The documents confirmed what the witnesses had already reported."

"Ana is a waitress. She was separated from her partner, who was abusive. He was violent. She has two children with him. Despite this, they still occasionally met, and she became pregnant. She reports that he came to her house and they started fighting, and he became enraged when she told him she was six weeks pregnant. On that day, he allegedly forced her to swallow a pill, and she began feeling unwell. After two days, she went to the hospital and had a curettage performed. She said that after a few days, he told her the pill was for her blood pressure and that she was used to taking it, but she doesn't remember the name and believes that it wasn't the medication that caused the abortion. Her ex-husband did not deny that he had abused her, but he said he didn't force her to take any medicine or ask her to abort when he found out she was pregnant, and that she had asked him to get a pill for her blood pressure. The case was dismissed due to lack of evidence."

"Cintia was three months pregnant and started feeling ill, so she went to the gynecologist. She was bleeding, and the doctor prescribed two medications: Buscopan and

Dactil-Ob, along with seven days of rest. However, she experienced another heavy bleeding episode and went to the bathroom, where the fetus was expelled. She was taken to the hospital and stated that it was a spontaneous abortion. The doctors at the hospital asked where the fetus was, which was at her home. The diagnosis was of undetermined death. The Public Prosecutor's Office requested the case to be dismissed."

"Márcia went to the gynecologist because she was bleeding. She was prescribed two oinments: Fluconazole and Novaderme. According to medical opinions, these creams do not cause abortion. Márcia said she didn't know she was pregnant, had severe cramps, and was bleeding. She was assisted, bringing the fetus with her. The case was dismissed."

44 See the national study by Madeiro & Diniz (2016) on legal abortion services in Brazil.

45 This topic was addressed in an article published in 2007 (MELO, 2007), even before the merits of ADPF 54 were decided. Here, it is further explored and analyzed how this ruling might relate to ADPF 442, which seeks to decriminalize abortion up to the 12th week of gestation and is still pending judgment before the STF.

46 For an in-depth analysis of the case, refer to Lima (2015): *Aborto e Anencefalia: direitos fundamentais em colisão.*

47 See, regarding the violation of medical confidentiality in abortion cases, the article by Melo & Coral (2017): *Sigilo Médico e aborto sob a ótica do direito à privacidade e do direito da à saúde reprodutiva* [Medical confidentiality and abortion from the perspective of the right to privacy and the right to reproductive health], which addresses the topic in depth.

48 Based on a survey regarding the number of women being prosecuted for abortion in the state of São Paulo and data provided by the Court itself, 30 cases were selected in which habeas corpus petitions were filed. For further details, see the publication *30 Habeas Corpus: A vida e o processo de mulheres acusadas da prática de aborto em São Paulo* [30 Habeas Corpus: The Life and Trials of Women Accused of Abortion in São Paulo] (Public Defender's Office of the State of São Paulo, 2018).

49 The author defended her doctoral thesis in 1997 at the Department of Sociology of the Faculty of Philosophy, Languages, and Social Sciences at the University of São Paulo. The thesis focused on the topic of abortion and was titled *Cidadania de Corpo inteiro: Discursos sobre aborto em número e gênero* [Full-Body Citizenship: Discourses on Abortion in Numbers and Gender].

50 In this regard, Carmen Hein de Campos and Salo de Carvalho (2011, p. 150), in the article *Tensões Atuais entre a Criminologia Feminista e a Criminologia Crítica: A experiência brasileira* [Tensions Between Feminist Criminology and Critical Criminology: The Brazilian Experience], argue that acts of violence against women are, in most cases, encompassed within what criminal law and criminology define as traditional criminality. These acts involve tangible harm committed by and against real individuals, affecting concrete legal interests such as life, physical integrity, and sexual freedom. As such, they fall within the scope of actions that alternative

criminal policies — stemming from critical criminology and currently associated with minimal criminal law or guarantees-based approaches — consider legitimate grounds for criminalization.

51 Part of this section has already been the subject of reflections, initially formulated in the article: *A Criminilização do Feminicídio no Brasil, Direitos Humanos das Muheres, Princípio da Proporcionalidade e Direito Penal Mínimo* [The Criminalization of Femicide in Brazil, Women's Human Rights, the Principle of Proportionality, and the Minimum Criminal Law]. Here, the topic is further explored and revised (Melo, 2018).

52 an article published in the folha de são paulo newspaper, titled *idioma e facilidade de acesso atraem brasileiras para abortar em portugal* [language and ease of access attract Brazilian women to abort in portugal] (miranda, 2018), shows that Brazilian women have been traveling to portugal to have abortions in that country, which has been legal for more than a decade. statistics from the ministry of health registered 379 Brazilian women (residents or not) having an abortion in 2016 (out of a total of 15,416 in the country), 441 in 2015, and 423 in 2014, the first year when the statistics were recorded by nationality. that is, since 2014, nearly one Brazilian woman per day has been undergoing an abortion in portugal. foreign women residing there can have the abortion for free in the public healthcare system, while non-residents have to pay around 570 euros (with general anesthesia) or 500 euros (with medication). since abortion was legalized, portugal has completely eliminated maternal mortality related to abortion procedures.

53 Regarding the principle of proportionality, see Virgílio Afonso da Silva: "*O proporcional e o razoável*" (2002); Humberto Ávila: "*A distinção entre os princípios e regras e a redefinição do dever de proporcionalidade*" (2001). There is a differentiation between these authors: Silva demands a more rigorous conceptual approach, referring to the "rule of proportionality," while other authors, like Guerra (2002), label it as the principle of proportionality, which also happens in judicial decisions. In other words, the principle of proportionality is frequently mentioned, and sometimes even reasonableness. The rule of proportionality, as presented by Silva, requires the examination of necessity, adequacy, and proportionality in the strict sense.

54 Part of what is developed in this section has already been addressed in previously published works and is revisited and revised here to further explore the relationship between the international human rights protection system and the obligation to decriminalize abortion in Brazil, as derived from the recommendations of this system.

55 Such is the case that, in the United States of America, discriminatory laws regarding a citizen's race still prevail in many states, even with the endorsement of the Supreme Court of that country, while similar human rights violations occurred in the Stalinist USSR. This leads one to think that the adoption of equality as a principle, in a certain sense, had a merely rhetorical meaning.

56 Adopted and proclaimed by Resolution 217 A (III) of the United Nations General Assembly, on December 10, 1948.

57 Articles IV, V and XIII/1, respectively.

58 See J. A. Lindgren Alves (1994, p. 57).

59 Elizabeth A. H. Abi-Mershed and Denise L. Gilman (1997, p. 173) observed that the seven members of the Inter-American Commission on Human Rights are collectively mandated to represent all OAS member states. However, in the 37 years since its creation, only three women have been elected as members. Regarding the Inter-American Court of Human Rights, established in 1979, only one woman has served as a judge. Similarly, Lauren Gilbert (1997, p. 177) notes that the Inter-American Commission of Women, the body responsible for women's welfare within the OAS structure, plays a very limited role. This limitation stems, in part, from the fact that it lacks the same powers as the IACHR to receive complaints, conduct investigations, publish reports, make recommendations to member states, or even refer cases to the Inter-American Court, as also highlighted by Elizabeth A. H. Abi-Mershed and Denise L. Gilman (1997, p. 157).

60 In their work, Pimentel and Gregorut (2018) refer to this process as the *Humanização do Direito Internacional* [Humanization of International Law] and discuss, in depth, the General Recommendations of the UN Human Rights Committees and their crucial role in the authorized interpretation of international law norms.

61 See, regarding the incompatibility of the criminalization of self-induced abortion and abortion performed by a third party with the consent of the pregnant woman with the system of protection of women's human rights: José Henrique Torres (2015, p. 76-77) in *Aborto e Constituição*.

62 CEDAW/C/BRA/CO/7. *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Brazil.* 1. The Committee reviewed Brazil's seventh periodic report (CEDAW/C/BRA/7) during its 1026th and 1027th meetings, held on February 17, 2012 (see CEDAW/C/SR.1026 and 1027). The list of issues and questions raised by the Committee is available in document CEDAW/C/BRA/Q/7, and Brazil's responses can be found in CEDAW/C/BRA/Q/7/Add.1.

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