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Y

MAGISTRADOS DEL TRIBUNAL CONSTITUCIONAL

DE LA REPÚBLICA DOMINICANA

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**Las cuales fueron presentados contra las reformas penales contenidas  
en los artículos 107-110 de la Ley 550-14 Código Penal de la República Dominicana.**

por:

EL PROGRAMA INTERNACIONAL DE DERECHO DE SALUD SEXUAL Y  
REPRODUCTIVA, FACULTAD DE DERECHO, UNIVERSIDAD DE TORONTO

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### **Fundamento jurídico para la presentación del Amicus Curiae**

El Artículo 23 del Reglamento Jurisdiccional de ese Tribunal Constitucional establece que:

"Se considera amicus curiae o amigo del Tribunal a la persona física o jurídica, o a la institución del Estado que, ajena al litigio o al proceso del cual está apoderado el Tribunal Constitucional, somete un escrito de opinión con el objeto de colaborar en su edificación. El amicus curiae participa en casos de trascendencia constitucional o que resulten de interés público, como son la acción directa de inconstitucionalidad, el control preventivo de los tratados internacionales y los recursos de revisión constitucional de amparo en los cuales se ventilen derechos colectivos y difusos. Deberá poseer reconocida competencia sobre la cuestión debatida y su opinión carece de efectos vinculantes para el Tribunal Constitucional."

### **Interés del Programa**

El Programa Internacional de Derecho de Salud Sexual y Reproductiva de la Facultad de Derecho de la Universidad de Toronto es un programa académico dedicado a mejorar la promoción y protección legal de la salud sexual y reproductiva. El Programa se especializa en la aplicación del derecho a la igualdad y a la no discriminación en la regulación de la atención a la salud reproductiva. Éste ha colaborado con organismos gubernamentales e internacionales, organizaciones no gubernamentales e instituciones académicas para el desarrollo de políticas y conocimientos en la materia.

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This amicus brief is submitted to the Constitutional Court of the Dominican Republic to inform the Court about constitutional court decisions on abortion in other countries and, where appropriate, decisions on abortion of regional and international human rights tribunals. It is hoped that this brief will assist the Court in considering whether to uphold the 2014 amendments to the Penal Code of the Dominican Republic to allow abortion to save the woman's life and in cases of rape, incest or the event of a nonviable fetus (Article 110).

## **I. Evolving interpretation of the criminal law, consistently with the proportionality principle**

### **A. Evolving interpretation**

Courts have interpreted their countries' respective criminal abortion laws in evolving ways and consistently with the constitutional principle of proportionality to ensure justice. The Constitutional Court of Brazil supported an evolving interpretation to allow for therapeutic exception to the criminal prohibition of abortion in the case of a woman who was pregnant with an anencephalic fetus.<sup>1</sup> As Justice Cármen Lúcia explained: "Every time has its Law. Justice is not a finished idea, it is something society construes at each time."<sup>2</sup> Evolving interpretation is what enables the criminal law to adapt to new situations, thus ensuring justice.<sup>3</sup>

### **B. Proportionality analysis**

Interpretation evolves through the application of proportionality as an analytical tool by which courts balance constitutional and human rights and interests.<sup>4</sup> The Inter-American Court of Human Rights has explained that no human right, including the right to life, is absolute, but rather must be balanced against other rights. In holding Costa Rica's prohibition of in vitro fertilization to violate the American Convention on Human Rights, the Court concluded that the Constitutional Chamber of Costa Rica "based itself on an absolute protection of the embryo that, by failing to weigh up or take account the other competing rights, involved an arbitrary or excessive interference in private and family life that makes this interference disproportionate."<sup>5</sup> It has been explained that

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<sup>1</sup> Supremo Tribunal Federal [Supreme Court of Brazil] April 12, 2012, ADPF 54/DF [hereinafter ADPF 54], available at <http://www.law.utoronto.ca/irshl/AbortionLaw> accessed 20 April 2015, discussed in Luís Roberto Barroso, Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy in *Abortion Law in Transnational Perspective: Cases and Controversies*, R.J. Cook, J.N. Erdman and B.M. Dickens eds., University of Pennsylvania Press, 2014, 258-278.

<sup>2</sup> ADPF 54, note 1 at 216.

<sup>3</sup> Barroso, note 1 at 271-273.

<sup>4</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012.

<sup>5</sup> *Artavia Murillo et al. v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257 (November 28, 2012) para. 316, available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

Proportionality works as an analytical tool to shape ... judicial review by setting three consecutive standards of assessment, through which a court must proceed in assessing the constitutionality of a statute. These are the tests of *suitability*, *necessity*, and *strict proportionality (also called proportionality in the narrow sense)*. The doctrine requires that a court assess a statute against each test, and that the law pass each test in order to be declared constitutional.<sup>6</sup>

The following analysis of how courts are increasingly applying the proportionality framework in the constitutionalization of abortion is based on the following chapter:

Proportionality in the Constitutional Review of Abortion Law  
in  
*Abortion Law in Transnational Perspective: Cases and Controversies*, R.J. Cook, J.N. Erdman  
and B.M. Dickens eds., University of Pennsylvania Press, 2014, 77-97  
by  
Verónica Undurraga, Faculty of Law,  
Aldolfo Ibáñez University, Santiago, Chile

## 1. Suitability

The suitability test requires that a statute or a claim to restrict abortion, such as in this case, that infringes a constitutional right or value, such as women's rights to medically-indicated health care, "be rationally connected to a constitutionally legitimate aim. A court must thus assess both the legitimacy of the objective and the appropriateness of the means chosen to pursue it. In abortion law, the typical suitability question asks whether criminalization is a suitable legislative measure to protect unborn life."<sup>7</sup>

The Supreme Court of Brazil overturned criminal prohibition of the termination of anencephalic pregnancies because the legitimate aim of protecting prenatal life and viability at birth cannot be achieved because the fetus is inherently not viable.<sup>8</sup> The means chosen to achieve the aim of reducing the overall abortion rate are brought into question by the evidence that criminal prohibitions only make abortion unsafe, but do not affect the overall incidence of abortion.<sup>9</sup> "The suitability test thus ... increasingly calls for empirical assessment of the law's effectiveness, namely evidence of whether criminalization is associated with lower or reduced abortion."<sup>10</sup>

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<sup>6</sup> Verónica Undurraga, Proportionality in the Constitutional Review of Abortion Law in *Abortion Law in Transnational Perspective: Cases and Controversies*, R.J. Cook, J.N. Erdman and B.M. Dickens eds., University of Pennsylvania Press, 2014, 77-97, 81-82.

<sup>7</sup> *Ibid* at 82.

<sup>8</sup> ADFP 54, note 1.

<sup>9</sup> Gilda Sedgh et al., "Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008," *Lancet* 379, No. 9816 (2012): 625–32; World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2nd ed. (Geneva: World Health Organization, 2012), at 23.

<sup>10</sup> Undurraga, note 6 at 84.

The Portuguese Constitutional Court explained that criminalization of abortion “is only legitimate when efficiency can be attributed to it, as a minimum requirement.”<sup>11</sup> In affirming the constitutionality of a statute decriminalizing abortion in the first ten weeks of pregnancy, the Portuguese Constitutional Court cited the ineffectiveness of criminal law not only in failing to lower abortion rates, but also in failing to create “an atmosphere that would favor a decision to maintain a pregnancy.”<sup>12</sup> The Court explained that “when exceptionally [a conviction] happens, the social reaction is more of uneasiness than of applause.”<sup>13</sup> The Court explained that a justification for criminal prohibition that is based on the idea that criminalization is the only way in which society expresses disapproval of abortion, is not a sufficient reason for prohibition. Accordingly, the Court requires evidence of lower abortion rates to show the effectiveness of criminal law in achieving a legitimate aim. Where such a showing cannot be made, a criminal abortion law is not suitable and thus disproportionate.<sup>14</sup>

## 2. Necessity

If a showing of suitability of criminal prohibition can be made, then a court is required to move next to the necessity test, to ask “whether criminalization is the least restrictive means available to pursue the protection of unborn life.”<sup>15</sup> Verónica Undurraga explains

In criminal law theory, the necessity test is expressed in the well-known *ultima ratio* principle: the threat of criminal punishment must be the last resort of the legislator. The idea behind this principle is that there is a continuum of protective measures: ranging from the least to the most invasive.<sup>16</sup>

The legislator should adopt sufficiently effective measures that are least infringing of rights. Under the *ultima ratio* principle, the merit of criminalization must be demonstrated rather than assumed.<sup>17</sup> Moreover, there is not necessarily a relationship between the invasiveness of a measure and the effectiveness of protection it affords. “It is probably the case, for example, that paid maternity leave and public childcare may be much more effective in preventing abortion than criminal sanction.”<sup>18</sup>

In its 2006 decision, the Colombian Constitutional Court applied the *ultima ratio* principle to strike down a near complete criminal prohibition of abortion.<sup>19</sup> Verónica Undurraga notes that

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<sup>11</sup> Tribunal Constitucional (Constitutional Court of Portugal) 2010, Acórdão No. 75/2010, at para. 11.4.8 [hereinafter Acórdão No. 75/2010] available at <http://www.law.utoronto.ca/irshl/AbortionLaw>, discussed in Undurraga, note 6 at 84.

<sup>12</sup> Acórdão No. 75/2010, note 11 at para. 11.4.8.

<sup>13</sup> Acórdão No. 75/2010, note 11 at para. 11.4.8.

<sup>14</sup> Undurraga, note 6 at 86.

<sup>15</sup> Undurraga, note 6 at 82, see also 86-88.

<sup>16</sup> Undurraga, note 6 at 86.

<sup>17</sup> Undurraga, note 6 at 87.

<sup>18</sup> Undurraga, note at 6 at 87.

<sup>19</sup> Corte Constitucional (Constitutional Court of Colombia) May 10, 2006, Sentencia C-355/06, para. VI.5 [hereinafter Sentencia C-355/06] available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

“In an earlier judgment, the Court has explained that the principle of proportionality requires criminalization to be avoided when the state has less restrictive means to achieve its objectives.” She cites from the judgement that “It is disproportionate that the legislature chooses the means that most impinges on personal liberty, criminal law, when it has other tools that are less harmful to those constitutional rights to secure the same values.”<sup>20</sup> She goes on to show how the same principle applies in the abortion context,<sup>21</sup> explaining that the Colombian Constitutional Court concluded that the legislator may resort to criminal law only where there is an “insufficiency of other means to guarantee the effective protection of the life of the unborn.”<sup>22</sup>

In 2008, the Mexican Supreme Court declared constitutional the decriminalization of abortion in the first twelve weeks of pregnancy.<sup>23</sup> The reform had been challenged as violation of the right to life of the unborn. A majority of the Court held that unless the Constitution or an international human rights treaty mandates the legislature to criminalize abortion, it is free to decide on the most appropriate measure to protect unborn life.<sup>24</sup> The Court declared that if the legislature decides to criminalize abortion, it must respect the limits on the use of criminal law set by the constitutional rights of women. The Mexican decision dissociates respect for the status of unborn life from any necessary means of protection. This approach rejects the common notion that if the fetus is recognized as a holder of a constitutional right, there is necessarily a constitutional duty to criminalize abortion. In moving away from an absolutist conception of the right to life, the Court allowed proportionality to play a more prominent role in upholding the legislature’s decriminalization of abortion during the first trimester.<sup>25</sup>

In 2010, the Portuguese Constitutional Court also deferred to legislative choice of protective measures, rejecting any assumed necessity of criminalization. It expressly declared that any assumed legitimacy of criminal law was mistaken: “criminal punishment is the most intrusive instrument . . . [and] cannot escape a positive examination; . . . the efficiency of criminal law cannot be automatically deduced from the inefficiency of other means.”<sup>26</sup>

A proportionality analysis thus requires a relative assessment of different legal measures of protecting prenatal life, not assuming that the most invasive approach of criminal law is the most effective. Rather it calls for:

- improved understanding of the causes of abortion and effective means of its reduction, and
- improved understanding of effective ways to protect prenatal life in order to ensure healthy pregnancy outcomes for both the woman and the fetus.

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<sup>20</sup> Corte Constitucional (Constitutional Court of Colombia) 2002, Sentencia C-370/02, para. VI.22 available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

<sup>21</sup> Undurruga, note 6 at 87.

<sup>22</sup> Sentencia C-355/06, note 19.

<sup>23</sup> Suprema Corte de Justicia de la Nación (Supreme Court of Mexico) 2008, Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007 [hereinafter Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007] available at <http://www.law.utoronto.ca/irshl/AbortionLaw>, at 189.

<sup>24</sup> *Ibid*, Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, at 189.

<sup>25</sup> Undurruga, note at 6, 88.

<sup>26</sup> Acórdão No. 75/2010, note 11 at para. 11.4.8.

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**a. Improved understanding of the causes of abortion and effective means of its reduction**

Verónica Undurraga explains that “The experience of those countries that have achieved the lowest rates of abortion having the least restrictive criminal laws on abortion should guide the courts in the application of the necessity test. Against such evidence, criminal laws cannot be reasonably defended as necessary if the objective of the law is to reduce abortion rates. Rather, advocates and courts should make use of growing research that demonstrates the key interventions to reduce abortion rates are effective and sustainable programs, including education and access to family planning, to reduce unwanted pregnancy, as well as those ensuring social and economic support for women who wish to continue their pregnancies and become mothers,”<sup>27</sup> such as paid maternity leave and public childcare.<sup>28</sup>

**b. Improved understanding of effective ways to protect prenatal life in order to ensure a healthy pregnancy outcome for both the woman and the fetus**

Less restrictive, and even more effective, measures to protect prenatal life than criminal prohibition of abortion involve health and social policy measures to ensure healthy pregnancy outcomes for both the woman and the fetus. Such measures include:

i. improved nutrition during pregnancy, such as folic acid supplements, to reduce the rate of neural tube defects that make pregnancies nonviable;

ii. clinical measures, such as to:

- decrease miscarriages, including recurrent miscarriages, of wanted pregnancies;<sup>29</sup>
- reduce maternal mortality, now estimated worldwide at around 287,000 maternal deaths of women annually,<sup>30</sup> including increasing the availability of and access to intrapartum care—care before, during and after childbirth;<sup>31</sup>
- decrease the estimated 5.9 million perinatal deaths worldwide annually, meaning fetal or early neonatal deaths that occur during late pregnancy,

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<sup>27</sup> Undurraga, note 6 at at 88, citation omitted.

<sup>28</sup> Undurraga, note 6 at 87.

<sup>29</sup> R. Rai & L. Regan, Recurrent Miscarriage, 368 *Lancet* 601 (2006); I.A. Green, “Antithrombotic Therapy for Recurrent Miscarriage?” *New England J. of Medicine* 362; 17 1630-1631, Apr 29, 2010.

<sup>30</sup> World Health Org. et al, *Trends in Maternal Mortality: 1990 to 2010*: WHO, UNICEF, UNFPA and The World Bank Estimates (Geneva, WHO, 2012)

<http://www.who.int/reproductivehealth/publications/monitoring/9789241503631/en/> accessed 20 April 2015,

<sup>31</sup> O.M.R. Campbell & W. J. Graham, Strategies for Reducing Maternal Mortality: Getting on with What Works, 368 *Lancet* 1284 (2006).



that is at 22 completed weeks gestation and over , during childbirth and up to seven completed days from birth;<sup>32</sup> and

iii. socioeconomic measures to reduce vulnerabilities of pregnant women to poor pregnancy outcomes,<sup>33</sup> including intimate partner violence against pregnant women.<sup>34</sup>

These means go much further in protecting prenatal life than criminal prohibition of abortion, because they increase the resources available to maximize healthy pregnancy outcomes for both the woman and the fetus, and develop public policies that are consistent with women's rights and serve women's and men's interests in family life.<sup>35</sup> The Mexican Supreme Court held that the legislature is free to determine the most appropriate means to protect unborn life provided it respects the rights of women in doing so.<sup>36</sup>

Like effectiveness, the necessity of criminalization cannot be taken for granted. Under proportionality, the use of penal measures is justified only as a last resort, where alternative measures are proven insufficient to the protection of unborn life.

### 3. Strict proportionality

Verónica Undurraga explains that under this last stage of the proportionality analysis, courts are required to ask whether the protection of unborn life by a restrictive abortion law or law of total prohibition is worth the sacrifice it demands of women. The strict proportionality test “requires a court to ask whether, even if criminalization is found suitable to the protection of unborn life and the least infringing of all alternatives, the sacrifice it demands of women is justified.”<sup>37</sup> Courts are increasingly ruling that the state cannot impose such sacrifices on women,<sup>38</sup> and that attempts to restrict access to abortion are not constitutionally permissible infringements on women's constitutional rights.<sup>39</sup>

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<sup>32</sup> E. Åhman & J. Zupan, *Neonatal and Perinatal Mortality: Country, Regional and Global Estimates 2004* (Geneva: WHO, 2007) p. 2, and Table 2 <[http://whqlibdoc.who.int/publications/2007/9789241596145\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596145_eng.pdf)> accessed 20 April 2015.

<sup>33</sup> V. Filippi et al., Maternal Health in Poor Countries: The Broader Context and a Call for Action, 368 *Lancet* 1535 (2006).

<sup>34</sup> J. Cook & S. Bewley, “Acknowledging a persistent truth: domestic violence in pregnancy” (2008) 101 *Journal of the Royal Society of Medicine* 358-363.

<sup>35</sup> R.J. Cook & S. Howard, R.J. Cook & S. Howard “Accommodating Women's Differences under the Women's Anti-Discrimination Convention” (2007) 56 *Emory Law Journal* 1039, 1087-1090, 1050 Cook, R.J. “Interpretar la protección de la vida” 22.43 (April 2011) *Debate Feminista* 151-168.

<sup>36</sup> Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, note 23 at 189, discussed in Undurraga note at 87-88.

<sup>37</sup> Undurraga, note 6 at 82, 89-95.

<sup>38</sup> Sentencia C-355/06 (Colombia), note 19.

<sup>39</sup> Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007 (Mexico), note 23; Acórdão No. 75/2010 (Portugal), note 11.

## **II. The fetus has a constitutional value, but does not hold legal rights**

Courts have held that the fetus has a constitutional value, but is not a holder of legal rights. In a challenge opposing a proposed 1985 bill extending the grounds for lawful abortion in Spain,<sup>40</sup> the Spanish Constitutional Court in 1985 upheld the proposed law.<sup>41</sup> The Court explained that the fetus is not a holder of rights, but that the right to life provision of the Spanish Constitution (Article 15), in conjunction with its provision protecting human dignity (Article 10), does elaborate a general norm to protect prenatal life.

In 2005, the Colombian Constitutional Court, in declaring the criminal prohibition of all abortions unconstitutional, recognized the objective value of life, including fetal life. However, the Court distinguished between the objective value of life and the claimed legal right to life. The legal right to life was ruled to be limited to a born human being, while the objective value of life can be protected before a fetus has been born.<sup>42</sup> The Court explained that the state can protect prenatal life, but it may do so only in a way that is compatible with the rights of women: “A woman’s right to dignity prohibits her treatment as a mere instrument for reproduction. Her consent is essential to the fundamental life changing decision of giving birth to another person.”<sup>43</sup>

In 2010, the Portuguese Constitutional Court similarly upheld the constitutionality of a 2007 law<sup>44</sup> that enables a woman to decide to terminate a pregnancy during the first 10 weeks of pregnancy, provided she undergoes counseling and a three-day reflection period.<sup>45</sup> The Portuguese Constitutional Court explained that the unborn is not a rights holder under the right to life provision of the Portuguese Constitution,<sup>46</sup> but that the unborn is to be protected as an objective value.<sup>47</sup>

## **III. The state’s interest in protecting prenatal life consistently with women’s rights**

Courts have ruled that the state’s interest in protecting prenatal life has to be pursued consistently with women’s rights, and have determined that the balance of competing rights may be struck by:

### **A. Protecting prenatal life through counselling and reflection delay provisions**

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<sup>40</sup> This bill became Organic Law 9/1985 (Spain).

<sup>41</sup> Tribunal Constitucional (Constitutional Court of Spain) April 11, 1985, S.T.C. 53/1985, 1985-49 BJC 515, available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

<sup>42</sup> Sentencia C-355/06 (Colombia), note 19.

<sup>43</sup> C-355/06, note 19, Section 10.1.

<sup>44</sup> Portuguese Law No. 16/2007 of April 17.

<sup>45</sup> Acórdão No. 75/2010, note 11.

<sup>46</sup> Portuguese Constitution, Article 24.

<sup>47</sup> Acórdão No. 75/2010, note 11.

Courts have found that exceptions to criminal prohibition that contain counselling and reflection delay provisions in their countries' respective laws, in order to protect prenatal life, are consistent with women's rights. For example, the Portuguese Constitutional Court upheld legislation that allows abortion during the first 10 weeks of pregnancy after a delay period for reflection and non-directive counselling.<sup>48</sup>

## **B. Protecting women's rights through constitutional provisions on dignity**

Judicial decisions from other countries have held that dignity requires an interpretation of the criminal law that is consistent with women's rights and wellbeing. For example, the Colombian 2006 decision used the constitutional provision on human dignity to allow for abortion on extended indications, to ensure that women are no longer treated as "reproductive instrument[s] for the human race."<sup>49</sup> The Court explained the meaning of dignity as follows:

[T]he rules which flow from the concept of human dignity — both the constitutional principle and the fundamental right to dignity — coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: i. autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); ii. certain material conditions of existence (to live well); and iii. intangible goods such as physical integrity and moral integrity (to live free of humiliation)...<sup>50</sup>

As a result of this foundational concept of human dignity, the Court explained that

...when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.<sup>51</sup>

In the international human rights context, dignity means that individuals are to be free from treatment that denies them dignity. For instance, the U.N. Human Rights Committee held Peru

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<sup>48</sup> Acórdão No. 75/2010 note 11, discussed in R. Rubio Marin, *Abortion in Portugal: New Trends in European Constitutionalism in Abortion Law in Transnational Perspective: Cases and Controversies*, R.J. Cook, J.N. Erdman and B.M. Dickens eds., University of Pennsylvania Press, 2014, 36-55, 36, 44, 46, 47.

<sup>49</sup> C-355/2006 note 19; see I.C. Jaramillo and T. Alfonso, *Mujeres, Cortes y Medios: La Reforma Judicial del Aborto*, (Bogota: Siglo del Hombre Editores, 2008); V. Undurraga & R. Cook, "Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006" in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Williams, S.H. ed. (Cambridge: Cambridge University Press, 2009), 215-247 <<http://ssrn.com/abstract=1573798>> accessed 20 April 2015; Spanish edition: "Incorporación Constitucional del Derecho Internacional y del Derecho Comparado de los Derechos Humanos: La Sentencia C-355/2006 de la Corte Constitucional de Colombia" <[http://www.law.utoronto.ca/documents/reprohealth/SP21-Undurraga\\_Cook\\_Colombia\\_2009.pdf](http://www.law.utoronto.ca/documents/reprohealth/SP21-Undurraga_Cook_Colombia_2009.pdf)> accessed 20 April 2015.

<sup>50</sup> Colombian decision C-355/2006, note 19.

<sup>51</sup> *Ibid.*

responsible when a governmental hospital denied an adolescent girl, pregnant with an anencephalic fetus, that is, a fetus without an upper brain and consciousness, access to abortion services to which she was legally entitled.<sup>52</sup> In order to protect prenatal life at any cost, the adolescent girl was forced to carry her pregnancy with the anencephalic fetus to term and to breast feed the child after birth, knowing that the newborn infant would inevitably die within a few days after birth.<sup>53</sup> The Committee found that the treatment forced upon this young girl constituted a violation of her rights to be free from inhuman and degrading treatment, to private life, to such measures of protection as are required by her status as a minor, and to her right to an effective legal remedy for violation of such rights.

Reasoning of the anencephaly decisions from other countries, such as Argentina<sup>54</sup> and Brazil,<sup>55</sup> is similar.<sup>56</sup> The Constitutional Court of Brazil interpreted its penal code provisions on abortion consistently with the constitutional principle of dignity.<sup>57</sup> Dignity has physical and psychological dimensions.<sup>58</sup> Justice Carmén Lúcia proclaimed in her individual opinion:

The termination of pregnancy of an anencephalic fetus is a measure protective of the physical and emotional health of the woman, avoiding psychological disorders she would suffer were she forced to carry on a pregnancy that she knew would not result in life. Note that termination of pregnancy is a choice, having to respect, of course, also the choice of those who prefer to carry on and live the experience to the end. But respect to this choice is respect for the principle of human dignity.<sup>59</sup>

#### IV. Conclusion

It is hoped that the above analyses of comparative constitutional court decisions on abortion is helpful for the Constitutional Court of the Dominican Republic to decide this case before it.

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<sup>52</sup> *K. L. v. Peru* (2005) Comm. No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (Human Rights Committee), available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

<sup>53</sup> *Ibid.*

<sup>54</sup> Corte Suprema de Justicia de la Nación [National Supreme Court of Argentina] 2001, *T., S. v. Gobierno de La Ciudad de Buenos Aires*, No. T.421.XXXVI, available at <http://www.law.utoronto.ca/irshl/AbortionLaw>.

<sup>55</sup> ADPF 54, note 1.

<sup>56</sup> R.J. Cook, J.N. Erdman, M. Hevia and B.M. Dickens, "Prenatal Management of Anencephaly" (2008) 102 *International Journal of Gynecology and Obstetrics* 304-308, Online at: <http://ssrn.com/abstract=1263905>; Spanish edition: "Manejo Prenatal de la Anencefalia," trans. Sandra Dughman. *Revista de la Sociedad de Obstetricia y Ginecología de Buenos Aires* 88.982 (Diciembre de 2009): 225-233, <<http://www.law.utoronto.ca/documents/reprohealth/Sp19-anencephaly.pdf>> accessed 20 April 2015.

<sup>57</sup> ADPF 54, note 1.

<sup>58</sup> Barroso, note 1 at 273.

<sup>59</sup> ADPF 54, note 1, discussed in Barroso, note 1 at 275.