

Mass Prosecution for Abortion: Violation of the Reproductive Rights of Women in Mato Grosso do Sul, Brazil



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Themis
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In the state of Mato Grosso do Sul, a state with one of the highest recorded rates of maternal mortality and clandestine abortion in Brazil, a judge decided in April 2007 to prosecute the doctor who owned a family planning clinic and 1,500 women who had allegedly had abortions at the clinic. Feminists from all over Brazil came together to try to stop the prosecution, which was unprecedented due to its scale. In this article, one of the activists involved in this initiative explores the issue of clandestine abortion in Brazil, the ineffectiveness of criminalizing abortion as a method of eradicating the practice, the specific context of Mato Grosso do Sul and the violations of the rights of the women who were subjected to a long judicial process, that, in the opinion of this author, is not legally valid. The case study concludes by describing the strategies used by feminists in their efforts to try to halt the criminal proceedings, which are still ongoing.

Introduction

The Brazilian feminist movement began fighting for the decriminalization of abortion in the 1970s and gained strength at the end of the 1990s. More recently, the movement has proposed new strategies in the legislative field. However, at the same time that feminism was making advances, the fundamentalist movement was also organizing in Brazil. The possible prosecution of approximately 1,000 women for allegedly having had abortions in the city of Campo Grande, in the state of Mato Grosso do Sul, is the largest mass prosecution of women orchestrated by religious fundamentalism in Latin America.

The criminal proceedings began in April 2007 with the confiscation of more than 10,000 medical records of patients; at last count, more than 300 women have been sentenced to community service in nurseries and pre-schools. The strategy used by the police to raid a family planning clinic and confiscate medical records set a dangerous legal precedent. Using information in those medical records, the police began an

investigation of the women who visited the clinic during its almost twenty years of operation. The large number of women convicted for a single “crime” is unprecedented in Brazil and represents an en masse criminal prosecution.¹

Feminist organizations in Brazil met as part of the network *Jornadas pelo Direito ao Aborto Legal e Seguro* (Conference for the Right to Legal and Safe Abortion, hereinafter “*Jornadas*”).² Members, including the Comissão de Cidadania e Reprodução (Commission on Citizenship and Reproduction Committee, CCR), Themis - Assessoria e Estudos de Gênero (Legal Advice and Gender Studies),³ Rede Feminista de Saúde e Direitos Reprodutivos (Feminist Network for Health and Reproductive Rights) and the Centro Feminista de Estudos e Assessoria (Feminist Centre for Studies and Advisory Services, CFEMEA) went to Campo Grande to obtain information about the case and collaboratively develop a strategy to challenge the prosecution of these women.⁴ These organizations drafted a report with the information obtained, which included interviews with various people involved and which was then presented to all the members of *Jornadas*.

Abortion in Brazil: A Public Health Problem

The World Health Organization (WHO) estimates that 210 million women around the world become pregnant each year. Almost 80 million do not plan their pregnancies. One hundred thirty million pregnancies result in live births, while 46 million women voluntarily end their pregnancies. Of these women, 27 million do so legally and 19 million outside the law.⁵

The WHO reports that unsafe abortion constitutes one of the greatest public health problems while receiving the least amount of attention in the Global South, with serious consequences for women’s lives.⁶

According to Ipas Brasil and the IMS (Instituto de Medicina Social), close to one million women have abortions each year.⁷ The same research identified great regional variation relating to the risk of unsafe abortion among women of reproductive age (between 15 and 49 years of age). In the Central-Western Region where the State of Mato Grosso do Sul lies, the rate is 2.81 abortions per 100 women, while in the Northeast Region, the rate of unsafe abortion is over 21.1%.

In the State of Pernambuco in the Northeast Region, between 2003 and 2007, 9.7% of all obstetrical admissions were related to abortion and 21% of all women admitted to medical establishments had post-abortion complications.⁸ The Central-Western and Northeast Regions also have the highest levels of social inequalities in the country. Another study revealed the profile of women who have abortions; most were young (between 20

and 29), working women, educated, Catholic, with a stable partner, and already had at least one child.⁹

According to the Ministry of Health, almost 250,000 women are admitted to the Public Health System (SUS) each year for post-abortion care.¹⁰ Additionally, unsafe abortion is the fourth leading cause of maternal death in Brazil.¹¹ In the Northeast Region, it is the second leading cause of preventable maternal death.

Although international and national studies confirm that abortion is a daily and unsafe part of Brazilian women’s lives, abortions on the basis of legally permitted grounds are very rare. The great majority of women end their pregnancy because they do not want to have a child at that specific time in their lives, but do not have the option of doing so legally. For this reason, unsafe abortion is a serious problem in terms of public health.

The Ineffectiveness of Criminalizing Abortion

The Brazilian Penal Code, which dates from 1940, only allows abortion in two circumstances: when the pregnancy is the result of rape or in order to save the life of the woman during pregnancy.¹² As shown by the studies mentioned above, this prohibition has not prevented abortions from being performed, but has served as an obstacle to women’s full enjoyment of health. The high rates of post-abortion hospital admissions indicate that women turn to health services only when they have complications resulting from an unsafe abortion.¹³

In 2005, the Ministry of Health published the *Technical Regulations for Prevention and Treatment of Diseases Arising from Sexual Violence against Women and Adolescents*.¹⁴ In spite of the existence of the Regulations, very few hospitals provide legal abortion services. Currently, there are only 53 legal abortion services in hospitals across the country, an insufficient number to meet the needs of Brazilian women, especially since the vast majority of services offered are in state capitals.

The almost total absence of legal abortion services impedes the exercise of this right and to access to health services by women, constituting a violation of their right to health and autonomy.

In addition, the clandestine nature of abortion mainly impacts poor women, women of African origin, and women with lower levels of education, who do not have access to health services or have difficulties accessing them and who are in a situation of greater vulnerability in general. The illegality of abortion creates high-risk behaviours among women as abortions are performed in inadequate conditions and are carried out by individuals without the necessary qualifications.

Thus, the criminalization of abortion results in women facing unwanted pregnancy being forced to resort to unsafe clandestine services or to carry the unwanted pregnancy to term. Both options violate a woman's fundamental rights as guaranteed by the Brazilian Constitution: preventing access to safe abortion violates the constitutional right to life, security and health, and unnecessarily exposes women to the risk of death and to the violation of their physical and mental integrity and denies them universal and equal access to health.¹⁵

The penalty for abortion has no utility, given that the threat of punishment does not prevent the practice taking place. In addition, the low enforcement of laws against abortion seen over the years reveals a certain acceptance of the practice, both by the criminal justice system as well as in the larger society. In a study of legal proceedings in cases of abortion, Danielle Ardaillon found that over a period of almost twenty years between 1970 and 1989, of a total of 765 decisions studied, 503 cases were dismissed for failure to gather the evidence necessary for prosecution, equivalent to 53% of total cases [relating to illegal abortion brought before the courts].¹⁶ The number of convictions at trial was only 32 (equivalent to 4%). In total, only 13% of cases went to trial, meaning that in 87% of the cases, it was not possible to establish the crime.¹⁷

Thus, it can be argued that, although abortion is a criminal act, in practice, prosecuting it is evidently not considered socially or legally relevant. Therefore, if we take a hypothetical number of post-abortion procedures performed by the health system in 2006—220,000—and compare it with the number of cases brought to trial, considering the figures reported by Ardaillon and assuming that they have not changed significantly, we see a large difference between the goals of the law in the abstract and the performance of abortion procedures in reality. If we also take as an example the estimated number of clandestine abortions performed, this disparity becomes even more shocking. This data alone should be sufficient for a change in the criminal law relating to abortion, the conclusion being that its decriminalization is the only rational solution. The criminal justice system's treatment of abortion is disproportionate, inappropriate, unreasonable, and extremely costly, and does not fulfill the law's intention.

Abortion remains illegal in Brazil due to pressure from fundamentalist movements and, especially today, by the support of parliamentarians with links to the Catholic Church and Evangelical churches, united in a parliamentary bloc in the National Congress that aims to prevent the decriminalization of abortion.

The Mato Grosso do Sul case is an attempt to reverse the low rates of enforcement of the crime of abortion and reveals a disturbing move by certain branches of the criminal justice system.

The Mato Grosso do Sul Case

The social context of the State of Mato Grosso do Sul contributes to the violation of women's human rights. According to the Brazilian Institute of Geography and Statistics (IBGE), the population of Mato Grosso do Sul that identifies as indigenous comprises 2.4% of its inhabitants,¹⁸ while people of African descent comprise 3.4% of the population. Incidents of sexual exploitation of children and adolescents; racial discrimination; indigenous children suffering from extreme hunger; the murder of indigenous people in land disputes; and other human rights violations have been reported in the State. In 2003, 250 cases of rape were reported in the State.¹⁹

Regarding the situation of sexual and reproductive rights of women, access to health services is insufficient because the State does not prioritize sexual and reproductive health as it neither acquires nor distributes contraceptives and does not guarantee access to family planning. Legal abortion services are not available in the entire State. The high rates of maternal mortality also demonstrate the lack of attention to the reproductive health of women. In 2005, the State had the seventh highest maternal mortality rate in the country: 70 deaths for every 100,000 births.²⁰

Thus, the criminal process described in this case is embedded in a context of widespread human rights violations, but is particularly relevant given that it is a criminalization on a massive scale.

The process of criminalizing women for having an abortion in Campo Grande, Mato Grosso do Sul, began on April 10th, 2007, when the most important national television channel aired a story about abortions allegedly being performed in a medical clinic focused on family planning. After the news was broadcast nationally, parliamentarians with links to the Catholic Church and the Parliamentary Front against Abortion paid a visit to the state prosecutor seeking the initiation of criminal proceedings against the doctor who owned the medical clinic, its employees, and the women who had allegedly had abortions at the clinic. The prompt response of the Public Prosecutor's Office and the police in pursuing and initiating proceedings against the doctor and the women involved revealed the strong influence that religious fundamentalism wields over the country's legal institutions.

The confiscation of medical records and their handling by police, even with judicial authorization, is an act without precedent in Brazil. The regulations of the Conselho Federal de Medicina de Brasil (CFM, Federal Council on Medicine) establish that medical records required by the judiciary must be handled by a medical expert in order to preserve privacy and the principal of confidentiality. However, the CFM has not spoken out about the handling of medical records by the police in this case. In compliance with the terms of the search warrant, 9,862 medical records were obtained and became evidence of the crime of abortion against the 70 women who were the first to be prosecuted.

The Violated Rights

Violation of the Right to Privacy: Breach of Confidentiality and of Medical Secrecy

The right to privacy implies respect for the autonomous decisions of women to have an abortion and the right to plan her family as she desires. The right to privacy extends to medical records.

This right was violated from the moment that the medical records, on which the entire prosecution in Campo Grande is based, were entered as evidence [to the courts], where they remained for almost three months. During that period, many people were involved with the case and thus had access to the files, which violated the patients' privacy.²¹

In addition, the handling of the medical records by laypeople constitutes a violation not only of the right to privacy but also the right to confidentiality and medical secrecy. Confidentiality, according to Cook, Dickens and Fathalla²² is the duty of professionals to maintain the secrecy of medical information they obtain in the course of their professional activities. In addition, a resolution of the CFM²³ requires that a (medical) expert be named to communicate information of a medical nature to the judiciary or to the police. Therefore, handling of medical records and the information they contain should and can only be done by a medical professional who is acting as an expert by order of the court.

Violation of the Right to Health

The right to health was also violated. The high rates of maternal mortality and obstetric health problems in Mato Grosso do Sul are related to illegal, unsafe, clandestine abortions. The absence of state-provided legal abortion services violates women's right to health.

Violation of the Right to Due Legal Process

Due to their handling of the medical records, the police submitted illegal evidence that did not respect the law requiring appointment of a medical expert, in addition to having violated patients' privacy rights.

Furthermore, because of the tampering with these medical records, confessions made in police custody—in some cases without the presence of a lawyer or public defender—must be considered invalid because they were not obtained legally. This has compromised the criminal proceedings as a whole, violating the right to defence and to a fair trial. Because the legality of the criminal proceedings was compromised, the judge's decision to apply the abovementioned sentence of community service cannot be considered valid.

Sentences in these cases, such as community service in nurseries or pre-schools (which the judge chose for their supposed "pedagogical" character) can be considered analogous to psychological torture and inhumane treatment of the women involved.²⁴ Generally, the many irregularities in the case compromise the integrity of the process and invalidate the proceedings as a whole.

Right to Equality and to Non-Discrimination

The criminalization of abortion only affects women's lives since men are very rarely prosecuted, thereby revealing direct discrimination against women. In the case of Mato Grosso do Sul, there is no indication that any men are being prosecuted. Beyond this, the criminalization of abortion disproportionately affects poor women who cannot pay for safe abortions. The most vulnerable groups of women are always the ones most affected by criminalization and police action. Women in more favourable economic circumstances go to private clinics for abortions and do not risk complications. The prosecution in Mato Grosso do Sul is focused on poor women who visited the clinic. Women who are rich and influential do not suffer from criminalization.

The Response of the Woman's Movement to the Prosecutions

Given the political and criminal aspects of the case, the woman's movement developed strategies on two fronts: the criminal process and the political arena. Thus, the feminist movement's first response was to visit Campo Grande and speak with everyone involved in the case in order to obtain the greatest amount of information possible for future legal action. They formed a feminist investigative commission comprised of representatives from CCR, Themis, CFEMEA and the Rede Feminista de Saúde e Direitos Reprodutivos (Feminist Network for Health and Reproductive Rights).²⁵ At the same time, they began to organize public demonstrations against the use of criminal law in Mato Grosso do Sul. The investigative commission met with representatives from all the governmental institutions, including the Municipal Secretary for Health as well as the judge handling the case in the court of first instance, the prosecutor, the public defenders and also the State Coordinator for Women and representatives from the local woman's movement. They then drafted a report which they sent to women's organizations.²⁶ The report was used by the members of Jornadas as a basis for discussing the development of a legal and political strategy. As a legal strategy, the organizations proposed submitting a *habeas corpus* petition,²⁷ a legal instrument to guarantee the right to liberty. As a political strategy, they decided to go to the media to publicly denounce the criminalization.

Many people made statements to the press, including the (national) Minister for Women, and criticized the prosecution. Articles and

interviews were also published in magazines and newspapers, and a public hearing was held in the National Congress. The most important national weekly magazines²⁸ carried stories about the case. According to most of the media, the doctor was a woman who used to perform abortions for money. The position of the feminists was to emphasize that the confiscation and handling of the medical records by the police was illegal, that abortion should be decriminalized, and that women should have the right to safe abortion. Doctors and lawyers who support the decriminalization of abortion also came out against the persecution of the women involved in the case.

The public demonstrations by feminists had an immediate impact and the judicial authorities had to explain themselves publicly. During the hearing in the National Congress, the judge presiding over the case stated that he did not oppose a woman's right to abortion and the prosecutor stated that he was just enforcing the law. These explanations were not enough to stop the criminal proceedings.

In addition, feminists drafted a report and distributed it at the Conferência Nacional de Direitos Humanos (National Conference on Human Rights)²⁹ held in the federal capital. The report condemned the violations of rights of the women implicated in the mass prosecution in Campo Grande. The report was also submitted to the Minister for Human Rights.

Regarding the legal strategy, the greatest difficulty was finding a woman who had had an abortion in the clinic and who was willing to take legal action. Given all the publicity the case received at a national level, the women involved were not willing to give interviews or speak about the case in public. This made the legal strategy very difficult. Many of the women, embarrassed by what was happening, moved away from the city.

The *habeas corpus* petition was submitted, but the court rejected it. The Public Defender's Office also submitted a collective *habeas corpus* petition in the name of all the women being prosecuted, but the court rejected that as well.

The women's movement continued to exert pressure, and the judge responsible for the case, who at first spoke of prosecuting 1,500 women, began to say that the number of women accused would not exceed 900. Nevertheless, this number still represents the largest en masse criminal charge ever laid against women in Brazil.

Looking Ahead

The case has not yet been concluded, and feminists continue to struggle to have the criminal charge dropped. Recently, one of the judges

accepted a *habeas corpus* petition but the majority of the Court rejected it. It seems that any legal initiative to acquit individual women of the crime of abortion in Campo Grande is rejected because it could be used by the doctor to advance her case. The intention of the authorities seems to be to find the doctor guilty with no extenuating circumstances. To that end, the judge responsible for the case decided that the doctor would be tried by a tribunal of judges. Her lawyers appealed the decision and now await the verdict of the higher court.

The experience in Mato Grosso do Sul is very important for Latin America, as the confiscation of medical records and their use to prosecute women sets a dangerous legal precedent. It is important not to forget how this case began: after a news item on television about the clinic, parliamentarians with links to the Catholic Church requested that the State Prosecutor bring criminal charges against the doctor, the personnel of the clinic, and the women who had allegedly had abortions there. The prompt response of the Public Prosecutor's Office of the State and the police is proof of the strong influence of religious fundamentalism on the legal institutions of the country.

Although the women's movement has not yet had success with its legal strategy, this does not mean that, under strong social pressure, the local court cannot change its position. In addition, the movement still has a strategy in reserve: it can bring the case to the Federal Supreme Court to question the constitutionality of the criminal process as a whole. This is a legal strategy that has not yet been explored.

Endnotes:

¹ While this case study was still being edited, the doctor who owned the family planning clinic and was being tried was found dead in her car on a road in Campo Grande. With her death, the proceedings against her were withdrawn, but the legal actions against the women and the staff of the clinic continue. The police are investigating the cause of death of the doctor.

² Jornadas pelo Direito ao Aborto Legal e Seguro is the name of a network of feminist organizations and women that work together for the decriminalization of abortion in Brazil.

³ At the time the events described in this article occurred, the author was a consultant with the CCR (Comissão de Cidadania e Reprodução/Commission on Citizenship and Reproduction) and a member of the Board of Directors of Themis.

⁴ Other organizations that are members of Jornadas and that participated in the process included Ipas Brazil, Católicas pelo Direito de Decidir (Catholics for the Right to Decide), Cunha, SOS Corpo and the Articulação de Mulheres Brasileiras (Organization of Brazilian Women).

⁵ World Health Organization, *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2000*, Geneva: WHO, 2004 (4th edition). Editor's Note (EN): While this case study will focus on a particular series of events in the state of Mato Grosso do Sul, in this section the author seeks to provide a broader picture of the problem and impacts of illegal and unsafe abortion in Brazil nationally and at state levels.

⁶ *Ibid.*

⁷ In 2007, according to research by Leila Adesse and Mário Monteiro, 1,054,243 women had abortions in Brazil. Leila Adesse and Mário Monteiro, *Magnitude do aborto no Brasil*, Rio de Janeiro, Brazil: Ipas/IMS-UERJ, 2008.

⁸ *Ibid.*

⁹ Débora Diniz, *Aborto: 20 anos de pesquisa no Brasil*, Brazil: Ministry of Health, 2009: 15.

¹⁰ According to statistics from the Ministry of Health from 2008, approximately 250,000 women turned to the public health system for post-abortion complications that year.

¹¹ Rui Laurenti, Beatriz Galli and Carmen Hein de Campo, *Estudo da Mortalidade de Mulheres de 10 a 49 anos, com Ênfase na Mortalidade Materna. Relatório Final*. Brazil: Ministry of Health, 2006.

¹² Article 128 of the [Brazilian Penal Code](#) states:

“Abortion performed by a medical professional is not punished:
Necessary abortion

1. if there is no other way to save the life of the pregnant woman;
- Abortion in cases of pregnancy resulting from rape
2. if the pregnancy is the result of rape and the abortion is performed with the pregnant woman's consent, or, if she is incapable, with the consent of her legal guardian.”

¹³ [Portal Saúde](#), Ministry of Health, Brazil.

¹⁴ *Norma Técnica para la Prevenção e Tratamento dos Agravos Resultantes da Violência Sexual contra Mulheres e Adolescentes*, Brazil: Ministry of Health, 2005. Originally published in 1999, revised in 2005. EN: See endnote #12 above. Under current legislation, abortion is legal in cases of rape, and the technical regulations lay out policies for treatment of survivors of sexual violence, including legal abortion.

¹⁵ Article 5 of the [Constitution](#) states that “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...” Article 196 establishes that “Health is a right of all and a duty of the State and shall be guaranteed by means of public and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to the actions and services for its promotion, protection and recovery.”

¹⁶ Danielle Ardaillon, “[Por uma cidadania de corpo inteiro: A insustentável ilicitude do aborto](#),” Associação Brasileira de Estudos Populacionais, (2000): 12.

¹⁷ *Ibid.*: 13.

¹⁸ According to IBGE, the population of Mato Grosso do Sul is 2,265,274 inhabitants, 54,479 of whom are indigenous. Instituto Brasileiro de Geografia e Estatística, “[Contagem da População 2007: Tabela 1.1.24 - População recenseada e estimada, segundo os municípios - Mato Grosso do Sul](#).”

¹⁹ Beatriz Galli and Carmen Hein de Campos, “Mulheres processadas em Mato Grosso do Sul: direitos humanos em questão,” *Direitos Humanos no Brasil 2008, Relatório*. São Paulo: Rede Social de Justiça e Direitos Humanos, 2008.

²⁰ Marta Ferreira, “[Mortalidade infantil caiu; morte entre mães é ponto ruim](#),” *Campo Grande News*, 22 Jan. 2008.

²¹ In addition to Article 102 of the Code of Medical Ethics on medical confidentiality, Article 154 of the Penal Code also guarantees professional secrecy in order to preserve the privacy of patients.

²² Rebecca Cook, Bernard Dickens and Mahmoud Fathalla, *Saúde reprodutiva e direitos humanos: integrando medicina, ética e direito*, Rio de Janeiro: Cepia, 2004.

²³ Resolution No. 1.065/2000 of the Federal Council on Medicine.

²⁴ Juliana Arini, “[Punidas por Abortar](#),” *Revista Época*, 12 May 2008.

²⁵ CCR, located in São Paulo; CFEMEA (Feminist Centre for Studies and Advisory Services) located in Brasília; Themis - Assessoria e Estudos de Gênero, located in Porto Alegre; and the Feminist Network for Health and Reproductive Rights located in Porto Alegre. The author visited Campo Grande as a consultant with CCR and a member of the Themis Board of Directors.

²⁶ The movement was organized around Jornadas pelo Direito ao Aborto Legal e Seguro, a network of women and feminist organizations fighting for the decriminalization of abortion in Brazil. The members of the commission were all members of Jornadas. As stated earlier, the author was a member of the commission.

²⁷ A *habeas corpus* case is a petition to the court requesting the release of a person deprived of liberty, or the cessation of the threat of depriving a person of liberty. The right to file a *habeas corpus* petition is guaranteed by the Constitution of the Republic of Brazil and is important in protecting people from possible abuses that the State may commit in the use of its police powers (for example, when a person is arbitrarily detained).

²⁸ Articles about the case were published in the magazines *ISTOÉ*, *VEJA* and *Época*.

²⁹ The Conferência Nacional de Direitos Humanos is a space in which government agencies and representatives from civil society meet to discuss and propose key recommendations for political action in the area of human rights. It was held in December 2008.

Author Bio:

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Organizational Bio:

Themis Assessoria e Estudos de Gênero, is a non-governmental feminist legal organization that works for the promotion and defence of the rights of women. It is based in Porto Alegre, Brazil. www.themis.org.br