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# Abortion, Criminal Law and the Ten Thousand Women: Portraits of the Inquisition in Contemporary Brazil

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## Abstract

The deleterious effects of the criminal law, which deals with abortion in Brazil, the restriction of reproductive rights and their impact on women's health will be the subject discussed in this chapter from an analysis of the "case of the ten thousand," as it became known the emblematic reproductive rights violation of a universe of almost ten thousand, women, occurred in Campo Grande, Mato Grosso do Sul (MS), in 2007, when a doctor's office was invaded by the police after a television report denouncing the establishment for abortion practices. This chapter discusses this paradigmatic case of violation of privacy and disrespect to reproductive health by making critical considerations about the implications of the criminalization of abortion on the physical and emotional integrity of women, highlighting the discursive contradictions between the Brazilian law and the United Nations Documents that deal with the consequences of unsafe abortion in the female population worldwide.

**Keywords:** criminal law, abortion, reproductive rights, reproductive health

## 1. Introduction

The criminal law that deals with abortion on the Brazilian territory walks against the progress of reproductive rights on the international board, of scientific evidences that highlight health risks caused by the criminalization and the positive experiences of safe abortion services on countries where it is legalized. It is a police assumption, a crime normalized by justice, a sin for many people and a serious public health problem, a controversial field of discussion, delicate and prickly.

On this conflicted combat ring I present the "ten thousand case," as it became known a Dantesque episode of reproductive rights' violation in an universe of almost ten thousand (9896) women, that took place in Campo Grande, capital of Mato Grosso do Sul (MS), provoking controversy between, on one side, the defenders of embryonic cells' life since conception and, on the other, the ones who defend the dignity of life and autonomy of women.

Mato Grosso do Sul is a state in the Midwest region of the Brazilian territory considered one of the country's granaries in planting grains and raising cattle. In this state with agrarian characteristics and conservative norms of gender perseveres

the contrasts of concentration of income, of the power of the oligarchies and of the large rural properties that reinforce the bases of *Coronelismo* and *Machismo*, besides the oppression of the women in the city, countryside, indigenous villages, border regions and *Quilombola* communities.

It was in this hostile environment that the greatest act of violation of women's rights occurred in the history of the Midwest region, with the accomplishment of the journalistic material on the Family Planning Clinic, of the former doctor Neide Mota Machado, in the largest television network of the region that denounced abortion practice without obtaining convincing evidence.

Remembering, on the 10th day of April in the year 2007, a medical clinic named "Familiar Planning Clinic," owned by an anaesthesiologist named Neide Mota Machado, was invaded by police after the exhibition of the news report that reported the place for performing abortions. On the occasion, police confiscated the medical records of ten thousand women, violating their right to privacy and medical confidentiality about health questions which concerned only them.

In Brazil, the juridical instrument that deals on abortion is the Criminal Code, dated from 1940, where, on its articles 124–128, condemns abortion in every case, with or without the pregnant' consent; excluding two exceptional situations: if the pregnancy results from rape or presents real risks to the woman's life. There is still a recent measure promulgated that allows the therapeutic anticipation of child-birth when it presents anencephalic fetus.<sup>1</sup>

Despite the severe criminalization of abortion (excluding the three cases mentioned above) the prison sentence has weak application in the country, due to the expressive numerical proportion of women that resort, daily, to this popularly used practice, unable to be imprisoned in a system that is already overcrowded and deficient. But it looms upon them the fear of being discovered, the threat of being denounced to police, stigmatized by society and the risk of punishment by justice [1–6].

About one in every five Brazilian women around 40 years old already interrupted a pregnancy at least once. In 2015 alone, the estimatives pointed 416 thousand abortions in all country. The clandestine abortion entails, frequently, countless sequels on health or even death, and imposes an expressive factor of mortality among women: it is the fifth biggest cause of maternal death, in its vast majority preventable if abortion was legalized, free and safe.<sup>2</sup>

Even before imminent risks, there are many women who dribble the law and exercise the right to choose to interrupt an unplanned, unwanted and rejected pregnancy, generally, clandestinely and without proper medical assistance. The restrictive criminal law, thus, fulfil a misogynistic pedagogical objective: the maintenance of compulsory maternity and the male guardianship over the feminine governability of their own body and destiny.

It is a disciplinary correction device that punishes legally and symbolically women that dare to enjoy the freedom of choice and self-care, with discernment and ethic autonomy, on the most intimate, hard, painful and delicate decision for abortion. "In practice, the laws concerning abortion has less prescriptive function

<sup>1</sup> In 2004, the National Confederation of Health Workers (*Confederação Nacional dos Trabalhadores na Saúde/CNTS*) filed a petition of an Argument of Fundamental Precept Violation (*Arguição de Descumprimento de Preceito Fundamental* (ADPF 54), arguing that the prohibition of child-birth anticipation of an anencephalic fetus is a violation of the mother's dignity. In 2012, the Federal Court of Justice approved the permission for anticipation on this case.

<sup>2</sup> Information available at the electronic address (in Portuguese): [https://www.huffpostbrasil.com/2018/07/31/aborto-no-brasil-como-os-numeros-sobre-abortos-legais-e-clandestinos-contribuem-no-debate-da-descriminalizacao\\_a\\_23486575/](https://www.huffpostbrasil.com/2018/07/31/aborto-no-brasil-como-os-numeros-sobre-abortos-legais-e-clandestinos-contribuem-no-debate-da-descriminalizacao_a_23486575/) [Accessed on: July 2018].

then symbolic disciplinary function; although not effective, it makes a normative environment that punishes the women psychologically socially” ([2], p. 38).

This article presents the history of the case of the ten thousand that was marked as a kind of contemporary witch hunt, with legal, symbolic and moral punishment and stigmatization of the feminine, that is, a methodology to condemn thousands of women using the sensationalism bonfire of mass communication vehicles, the religious dogmatism of the speech in support to life since conception, the coercive effects of a law about freedom of choice and the power of conservative forces that culminated with the inquisition of four women before a Popular Jury.

On the next part of this essay the text explores the relationship between gender relations and legal devices and the legislator's perspective on the differential treatment of male and female in various historical moments, highlighting also the influence of dogmatic religious groups and other conservative forces that press Brazilian parliaments in contemporaneity, in an attempt to enact antiquated laws that weaken or even disregard human rights, especially with regard to sexual and reproductive rights. After this subitem, it will focus on the story of the Familiar Planning Clinic since the start and highlight the paths that employees of such establishment took to the Jury trial, as well as the events that resulted on the violation of privacy and disrespect of reproductive health of the ten thousand. On the next section I talk about the most striking moments of the Jury Court and, lastly, I weave critical considerations about the implications of abortion criminalization on the physical and emotional integrity of women, highlighting the discursive contradictions between the Brazilian law and United Nations documents that deal with the consequences of insecure abortions among the female population around the world.

## **2. Juridical devices, disciplining of bodies: two-way street?**

Themes like abortion, maternity and law devices on the reproductive scope cannot be dissociated from gender conventions immersed on the historical context of each period, culture and society. On Classical Antiquity, for instance, many philosophers believed that men were transmitters of humanity oriented by the understanding that semen generated life in the receptacle of the female body. Women were conceived as a territory to seed and the ones at fault in case of sterility [7].

Women's anatomy was defective and deficient, said Aristoteles. Men, on the other side, were endowed with the creation act by the qualities inherent to their sex, of their breath and fertility of their seed when fertilizing the cold vessel of the women made life sprout, superiordr dimension of the masculine (omni)potence [8]. However, on the Greco-Roman world the decision for abortion did not suffer moral or legal condemnation. But the apparent freedom and autonomy of women on the control of their body was subordinated to the meticulous appraisal of the husband's or master's decision.

Thereby, abortion was only allowed when it did not go against the will of progeny and many were the men that accused women of denying them this right. On those cases, the crime was not about the abortion of the fetus, but to contradict the masculine's interests and will [7, 9].

On the Middle Ages, the Christianization of the West by the roman caused the collapse of the ancient pagan traditions, cults, belief and the rich pharmacopeia became stigmatized, hunt down and condemned. The women's knowledge became a heresy and a threat to the know-power of the first herbalists (doctors), proof of witchcraft and union with the devil in consequence of their weak and diabolical personality.

The evil and vile inclination of the feminine character is highlighted on *Malleus Maleficarum*, the most important known guide of identification and fight against



witchcraft. This document became something like a churchman Criminal Code indispensable to the catholic judges on the race against the witches. Born from a crooked rib, women are mysterious beings, of fragile sex, treacherous and cunning that distill the damnation above everyone, imperfect animals and liars worse than death. “Without the malignancy of women, not to mention the witchcraft, the world would keep existing immune to numerous hazards,” speculates the bull of the inquisitors ([10], p. 53).

Essentially related to sexuality and the mysteries of the universe, to the limits between life and death, like abortion, witches were nothing more than the peasants, lovers, prostitutes, midwives, healers, mourners, women that defied the church dogmas by holding knowledge and power about diseases relief and control of the body [11], like phytotherapeutic knowledge of medicinal teas, passed on from generation to generation through oral tradition, which united women, because the herbs were cultivated on the backyards, close to the kitchen, denoting a familiar and intimate knowledge of the feminine, highlighted Del Priore [12].

From Plato to Aristotle, going through the church philosophers, to the example of Saint Augustine and Thomas Aquinas<sup>3</sup>, many are the treaty that reaffirm the inequality of women in relation to men, highlights the historian Mary Del Priore [13]. According to her, the philosophical thinking of centuries XVIII and XIX justified the masculine domination in various ways.

Even the illuminists from the French Revolution (1789), carriers of new ideologies in the name of reason, freedom and equality and opponents to the church dogma when proclaiming the quality of rights to men, excluded women equating in some aspects to the conservatism and intolerance of the medieval catholic morality. Remember the french feminist Olympe de Gouges, that when elaborating the Declaration of the Rights of Woman and of the Female Citizen, in counterpoint to the Declaration of the Rights of Man and Citizen, was criminalized, condemned to death and decapitated in a public square under the accusation of subverting the designs of nature. The principles of Human Rights were, notoriously, erected grounded on the masculine [14, 15].<sup>4</sup>

Despite the resistance and women's fights for civil and politic rights, the secondary place delegated to them in the family and society ruled expressively on the Victorian Age. It was evident, so, that abortion was not allowed. With the ascension of social medicine there is a reinforcement of binary representations of gender versed as a science threshold. The fragility, the pudency, the affective characteristics in detriment of the rational ones and the subjection of sexuality to the maternalism constituted the medical normalizations for the feminine [14, 15].

The association of women to maternity, considered an innate biological instinct, built the normality parameters to the feminine sex prescribed by the masculine

<sup>3</sup> However, it is important to note: the Catholic Church has not always considered abortion a sin or a crime and it cannot be said that there was consensus on the subject over time. St. Augustine in the fourth century and Thomas Aquinas, a thousand years later, for example, considered the embryo a life only after 40 days of gestation (6 weeks). We can also cite the encyclical *Apostolicae Sedis* (1869), promulgated by Pope Pius IX, in Italy, which came to condemn abortion radically. But the reasons were not so much humanitarian as politics. It was the time of the unification war of Italy, and the pope needed Napoleon's army. In exchange, Bonaparte asked Pius IX to declare that the soul and human life were given from the conception, since the French low birth rate was a hindrance to the French emperor. See the article “The Catholic Church has not always been against abortion.” Available from: <https://www.revistaforum.com.br/igreja-catolica-nem-sempre-foi-contra-o-aborto/> [Accessed on: December 19, 2018].

<sup>4</sup> Even under this hostile atmosphere, women have claimed a different position in society claiming the right to education, work, political participation and full citizenship through a series of manifestations and protests.

gaze. The will to generate, give birth and motherhood were preponderant facts on the definition of a healthy and balanced organism settling the natural fate of women: get married, give birth, raise children, take care of the house, the husband and the children [9].

Such aspects also influenced the juridical world, because the definition of crime and offense followed a stereotype vision of the proper conduct to men and women. Cesare Lombroso, Italian doctor and criminologist and one of the most famous exponents of the racist and misogynist thinking of this phase of history, believed that women with outstanding erotism and intelligence did not have the maternal feeling, there so, were abnormality and dangerous creatures composing the group of the criminal, prostitutes and crazy that should be banished from society (Lombroso and Ferrero apud Soihet, [15]).

In general lines, those gender norms disseminating a world order unequal to men and women enrolled in Latin America from the European colonization remaining along the XIX century. In the scope of social relations, the masculine privileges on the field of economy, culture, politics and sexuality were backed by law, church recommendations and medical corporations that timidly were emerging [16].

The gender conventions dictated the life rules of men and women as outlined by the Civil Codes of the past centuries, drawn under the inspiration of Spanish and Portuguese law, heavily based on canonical principles. In them, women were banned from acting in the public scope and their rights to property, property management, inheritance, and decision making in marriage remained limited. In addition, criminal law judged the crimes committed by the male and the female sex differently, whose judgments involving human rights honesty and male honor highlighted these sexist distortions [16].

And in spite of the cultural atmosphere instituted by the bourgeois revolutions (Industrial and French Revolution) in Europe to have influenced the revision of canon law in Latin societies in the mid-XIX century, the new legal body processed to reiterate the family model already prescribed in the Canonical Code: religious, heterosexual, monogamous and undissolvable marriage, as well as the husband's authority over his wife and children (*Patria potestas*) [16].

Regarding Brazil, in 1830, in the Criminal Code of the Empire, a device that considers abortion a crime that jeopardized security and human life itself, with the exception of non-punishment when abortion was committed by the pregnant woman herself. The Criminal Code of the Republic of 1890 also did not punish women, but presaged punishment for the practice of abortion performed by third parties, with or without the consent of the pregnant woman, with aggravation if this resulted in her death.

Later in time, the Brazilian Criminal Code of 1940, which deals with abortion in Articles 124–128, allowed abortion only in cases of risk to the woman's life or due to rape and criminalized it in other situations. Concerning the permission of abortion involving sexual violence, the conception of jurists in general pointed out that the rape severely damaged male honor and dignity and tainted the offspring of the man who did not accept to support illegitimate children and pass on his inheritance. Therefore, it was a mentality that followed patriarchal period customs and not necessarily a concern for women, their physical and emotional health.

Although dated from 1940, the provisions of the Criminal Code concerning abortion remain in force, but are obsolete and anachronistic for the contemporary society. It is important to say that this legislation was promulgated in the government of Getúlio Vargas, president who took over the country through a coup. That is, the law that governs abortion in Brazil was drawn in full dictatorial regime, in a socio-cultural context of rigid gender customs: few women worked outside home, drove cars, had a college degree, could choose whether or not to have

children or even participated in movements, unions or actively on the political life of the nation. But it could be said that, paradoxically, it was advanced for the time, especially if we consider the countless bills, contrary to sexual and reproductive rights, that are currently being processed in the National Congress and the more flexible achievements, values and customs and from the point of view of gender relations that we find today.

The laws, roughly written by men, do not escape gender representations inserted in long term history. As remembered by Fausto [17], on the literary work “Crime and Routine,” a study about criminality in São Paulo city between 1880 and 1924, the efficiency of the criminal action is not only technical, but is related to social discrimination working as a repressive practice that can even criminalize behaviors apparently nonchalant to criminal law, like the imprisonment of prostitutes, homosexuals and women who opted for abortion.

That is, the inappropriate behavior according to sex within the family and society, as well as ethnic-racial characteristics influence the conception and definition of the offense and on the application of punishment on the transgression scope. Furthermore, Fausto [17] signaled the existence of criminal behavior that did not draw police’s attention, like assaults practiced by husbands and certain sexual crimes.

In 1945, the country resumed the redemocratization process and decades later, in 1964, suffered a new coup d’état orchestrated by the military, which overlapped the Democratic State and initiated a period of strong censorship, political persecution, torture and death. Even in this context, feminists denounced the oppressions of a patriarchal society, raised the flags of “personal is political,” preached the end to domestic violence, of defense of sexual freedom, of the non-demonization of contraceptive methods, of the right to control their own body and reproductive self-determination. Those discussions were also influenced by the emergence, on 1960, of the contraceptive pills.

The politization of the body, sexuality and reproduction gets special attention on the women’s movements. The slogan “our body belongs to us” was fundamental to think the diverse forms of subjugation of women and target of political action fundamental on a conception of citizenship that retrieved the autonomy and freedom of women in the experience of sexuality and reproduction [18, 19]. The search for economical, subjective and social autonomy also became essential to this feminine body in the process of emancipation and the existence of the feminist movements that insurged, which also helped to delimit a self-fight field concerning other social movements [18].

Since then Brazilian women obtained a series of achievements, like more space and participation in society, public politics and specific laws to prevent and reduce violence against women and changes on the conservative mentality on the field of gender relations in the sense of more equality. Many of these achievements were driven by International Conferences related to women rights promoted by United Nations (UN) on the decade of 1990 in conjunction with feminist activism.

Stands out the International Conference on Human Rights, held in Vienna in 1993 [20]; that states in its article 18 that rights of women and girls are inalienable; the International Conference on Population and Development, in Cairo in 1994, asks the States for investment on familiar planning politics, the reduction of maternal mortality and the review of punitive laws that concern abortion; and the IV World Conference on Women, at the city of Beijing in China in 1995, that requested to the government the use of gender perspective on the development of policies for women [21].

These UN meetings also helped to transpose the generic parameter of man (western, white, heterosexual) as a synonym for humanity, marking the liberal



conception of the text of the Universal Declaration of Human Rights of 1948 [22], extending the horizon of human rights for the inclusion and visibility of new subjects. They also revealed that the specifications, diversities and differences between men and women and among women themselves must be integrated into the discourse of human rights as factors of inequality and discrimination [23, 24].

However, the inequalities between men and women are still significant in Brazil. The voluntary abortion is not allowed by law yet, the participation of women on parliaments is minimal, the rates of domestic violence, of feminicide and maternal mortality are very high and, broadly, they still have the lower wages in the market for the same work developed when comparing to men.

In the last decades, the reversal has been enormous. On the field of reproductive self-determination it can be highlighted the dozens of legislative proposals (written under strong influence of conservative, fundamentalist sectors and dogmatic religious groups) that seek to restrict women's sexual and reproductive rights on process in the National Congress, like the Legislative Proposal 478/2007—called Statute of the Unborn (*Estatuto do Nascituro*), which prohibits abortion in all cases, even rape, and turns the insecure abortion into a heinous crime; the Legislative Proposal 3748/2008, which provides child support to the mother for giving birth to children conceived through a rape crime; the Legislative Proposal 1413/2007, which prohibits the distribution of emergency contraceptive (known as morning-after pill by SUS—the Health Unic System (*Sistema Único de Saúde*)) and its commercialization in drugstores, among others.

Thus, there are many initiatives in parliaments throughout the country that try to stop achievements in the field of human rights when it involves sexuality and reproduction. To be more emphatic, they are bills that try to prohibit emergency contraception, which strengthen the obstacles to the criminalization of homophobia and the recognition of rights to the homosexual population, as well as opposing the reformulation of restrictive legislation regarding abortion and of sex education programs in schools.<sup>5</sup>

From the religious field to the government policy scope there is a resurgence of fundamentalism and conservative forces that threaten the rights and lives of women. One of the strategies of the conservative groups is to keep the National Congress always on the agenda of discussing abortion as a crime and incompatible with human values in defense of life. An example of this is the numerous appealing projects cited above. The actions of conservative groups, such as the appealing projects cited above, generate tensions and wear and tear on the allied fronts of feminists, but are part of a well-orchestrated strategy by self-entitled “pro-life” for the strengthening of their ideals.

The pressure and interests at stake are so many that even in relation to the so-called “allied politicians,” the expected result and compromise are not always achieved. Former President Luiz Inacio Lula da Silva (PT), a progressive force, for example, who has already spoken publicly about the right of women to decide, signed the agreement with the Vatican in 2008, which preaches religious teaching in schools, financial support and a number of other measures in the countercurrent of the Lay State.<sup>6</sup>

<sup>5</sup> We cannot forget the bill “School Without Party”, that seeks to suppress discussions of gender, religion, sexuality and politics in the classroom and in the school space as a whole, setting a censorship and limitation of content to be taught mode, with punishment to the teacher if denounced by the student.

<sup>6</sup> The agreement between the Government of the Federative Republic of Brazil and the Holy See concerning the Legal Status of the Catholic Church in Brazil, signed in the Vatican City on November 13, 2008, was ratified by Decree No. 7107 of February 11, 2010. Available from: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2007-2010/2010/decreto/D7107.htm](http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/decreto/D7107.htm)



In the sowing of patriarchal values, fundamentalists, oligarchies and religious sectors are the groups that most represent the obstacles to advancing the fight for the decriminalization of abortion in Brazil. Generally, they have a conservative discourse from the point of view of biomedical science and the laity of the state. In the dispute for the concept of life, what prevails is the discourse of biological life from orthodox biomedicine and the mix of values of the State and Church, with strong articulation in the Executive.

And if in one hand reproduction and motherhood continue to be treated as the fated destiny of women, on the other, adoption is not yet a valued alternative to motherhood. In addition, the dispute in the field of reproduction also occurs through the market, with the industry of products for babies and pregnant women, new reproductive technologies, last generation ultrasonographies, etc.

Among this context, the neoliberal field advances in the Brazilian political culture, going through the health issue with the growth of foundations and private health plans to the detriment of the Unified Health System (SUS). It is also evident a scenario of high urban violence and at the same time indifference to this violence in most Brazilian urban centers. The marches that preach peace and not abortion, understood as a threat to life, start to appear, generally formed by the middle class who have a conservative vision of peace, since the fear of violence is what drives this kind of reaction by the average layers and other conservative groups, centered on their own navel.

There are also the strategies that the media has been adopting in relation to abortion, polarized by messages through soap operas and programs that are veiled or expressive against legalization and the frequent reports displayed in newspapers about the overflowing appearance of clandestine clinics in various regions of the country, as well as women leaving hospital in handcuffs for reports of unsafe abortion by doctors and other health professionals to the police.

A series of reports conducted by journalist Paula Guimarães, from the *Portal Catarinas*, named "From the emergency room to the penal system,"<sup>7</sup> carried out all over the country, portrays cases of criminalization of patients attended at the Health Posts or in hospitals, due to complications by badly done or even spontaneous abortions, evidence that health professionals have often reported to the police the injured women who entrust their lives to them.<sup>8</sup>

A research carried out by the Public Defense of Rio de Janeiro points out that the delations made by health institutions and professionals during emergency care for women by the practice of self-medication are more common than one can imagine and one of the main means of entry of patients into the penal system. To get an idea, in 65% of cases they were reported during emergency medical care, and in 20% of cases, by relatives and neighbors.<sup>9</sup>

<sup>7</sup> Consult the series "From the Emergency Room to the Penal System", produced by Paula Guimarães. Available at the electronic address: <https://outraspalavras.net/outrasaude/do-pronto-socorro-ao-sistema-penal/> [Accessed on: December 20, 2012].

<sup>8</sup> To keep track of this reality, the Collaborative Map of Criminalization by Abortion was launched, which compiles information and journalistic material on the cases of patients reported to the police while receiving medical care in health centers throughout Brazil. The Abortion Criminalization Collaborative Map can be accessed at this electronic address: <http://especiais.catarinas.info/mapa-colaborativo-da-criminalizacao-das-mulheres-por-aborto/> [Accessed on: December 20, 2012].

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In Campo Grande, in the year 2017, a case of spontaneous abortion was reported to the police by professionals from the Emergency Mobile Service (SAMU) and widely reported in the local press, suggesting that it was an intentional abortion and disseminated negative representations of the patient. Parts of a fetus were found in the toilet at the house of a married woman who requested emergency assistance from SAMU. The medical help turned into a police case. After receiving care at the residence by the SAMU team, she was taken by ambulance to Rosa Pedrossian Regional Hospital, where she received other medical care, but was kept under police surveillance and was released only after being interviewed.<sup>10</sup>

The sensationalism of the press regarding abortion strengthens the representations of women's biological determinism as mother (maternalisms). It is common the reports that disclose the cases of patients who provoked abortion, sought medical services resulting from complications, who leaves health institutions handcuffed after the care and are taken directly to the police station, in addition to the materials that denounce the clandestine clinics and their process of invasion by the police. The media spectacle on the news report that explore the closure of clandestine establishments that allegedly carry out procedures for intervention of unwanted pregnancies was evident in the case of women criminalized for abortion in Campo Grande, when the police, a public prosecutor and a judge of the jury created a task force for the massive indictment of the ten thousand women who passed through the Family Planning Clinic of Neide Mota over the 20 years of its operation, subject of the last two sections of this text.

### **3. The case of the ten thousand: the criminal chase and the “witches” exposition in Brazil**

Clandestine clinics of abortion in Brazil have been, frequently, target of media reports and spectacularization. One of the involvement marks of media on public revelation of places that supposedly performed pregnancy interruption surgeries was the case of the ten thousand. This story started on April 10, 2007, at Campo Grande city, when a news report made with a hidden camera,<sup>11</sup> operated by a fake pregnant couple looking for abortion, denounced the existence of a Familiar Planning Clinic in function for over 20 years at the capital downtown.

On April 11 the police started the investigation and on April 12 the state's General Prosecutor was visited by representatives of the National Congress' Mix Parliament Front on Life's Defense (against abortion) that put pressure on authorities for the establishment of a criminal process against the owner of the place, the doctor and anaesthesiologist Dr. Neide Mota Machado [25, 26].

The pressure had effect. On April 13, 2007, policemen with a search warrant closed the clinic without the doctor being there, and confiscated surgical instruments, medicines, syringes, needles and patient's private documents. The medical reports of 9896 women were scrutinized by the police and, lately, by justice strong-arms [25, 26].

<sup>10</sup> To keep track of this reality, the Collaborative Map of Criminalization by Abortion was launched, which compiles information and journalistic material on the cases of patients reported to the police while receiving medical care in health centers throughout Brazil. The Abortion Criminalization Collaborative Map can be accessed at this electronic address: <http://especiais.catarinas.info/mapa-colaborativo-da-criminalizacao-das-mulheres-por-aborto/> [Accessed on: December 20, 2012].

<sup>11</sup> Later, another report was made, this time with camera in sight, in which the medical anesthesiologist NeideMota Machado reported to the journalist HonórioJacometto the abortion requested by the clients, but in a safe manner and with all appropriate medical care.

After 3 months, the state's Prosecution Office offered a suit against Neide Mota and other six of her employees for the crime of abortion and criminal association [27]. The medical reports (9896) of the patients, handled without the presence of an expert, were included on the process as proof for the indictment. In order for the crime not to prescribe, the prosecution denounced all the ten thousand women [25, 26].

That is, the medical reports served as basis to the process, especially the ones that had ultrasonography, positive pregnancy tests and forms signed by women authorizing the medical procedures. Cases of prescription and ones with information judged incomplete by justice were discarded [25, 26, 28]. Such a measure resulted on the accusation of 1500 women for crimes of abortion.

Of these, the first called to attend to the police station did not know what the intimation was about and were submitted to questioning without clarification of their rights, like the right to keep silent or having the presence of a lawyer or public defender. This fact represents a violation of the right to full defense and the minimal judicial guarantees [27]. To some of them, it was offered the process' suspension so they would not be taken to jury, as long as they accepted to collaborate with investigations and under some conditions. Only five men were sued on this stage [26] and, as the story went, it is estimated that less than 10 were indicted.

Through 3 months, the process were available for public consultation on the Justice Court of Mato Grosso do Sul's (TJ/MS) website and many people had access to the names, accusation and address of the women who supposedly had had abortions, violating the constitutional right to privacy [26].

During the judicial treatment of the case there was a sentence reversion (based on the law 9.009/95) on the alternative sentences and many women were able to choose to pay a fine, community service or donation of a basic products list. Poor women, generally, opted for community service, where they were obligated to make it on day care centers and schools, bringing moral and emotional embarrassment and strong self-blaming. The Judge's declaration to the press revealed that this condemnation was on purpose: they should take care of children and regret what they had done [26].

It is established that the police mandate to close the Clinic did not authorize the apprehension of medical reports. The delegate that took the case, Dra. Regina Márcia Rodrigues de Brito affirmed to Ipas Brasil: "if we were investigating a clinic where they did not make abortions, we would not have taken the medical reports" ([26], p. 6). She also affirmed that it would not be possible to sue the women without information that were on the reports [26].

According to Art. 154 of the Penal Code, to reveal secrets to someone without fair cause concerning a role or profession and which revealing could cause damage to another is punishable with 3 months to 1 year of detention and a fine. Art. 102 of the Brazilian Medical Ethic's Code describes methods to secure the confidentiality and protect patient's privacy on criminal investigations. Not even a judicial order can suppress the mandatory protection of professional secrecy.

Resolution n° 1.605/2000 of the Federal Medical Council, on the Art. 4, is another document that determines the procedures: "if a judicial authority demands the presentation of medical reports during a criminal process, the doctor will provide those documents only to a legal expert named by the judge that will analyse the question" (p. 6, [26]).

In light of that, only 1500 women were indicted, but them all (around 10,000) had their rights violated, even though both medical secrecy and their privacy were disrespected. After all, the medical reports were handled by police and justice employees without the presence of an expert, damaging the women's right to medical secrecy, which concerns only them since it involves the intimacy of their bodies [26, 27].



As the investigation unrolled, NeideMota Machado (clinic's owner) and four of her employees were pronounced, by all the Court Judges of TJ/MS, to be judged by a popular jury. However, something new and unexpected happened: the enigmatic death of NeideMota.

On the afternoon of November 29 of 2009, a Sunday, Neide was found dead inside her car on a road near the farmhouse where she lived: "On her right hand she had a 10 ml syringe and between her legs there was another one, without a needle. There was also an used bottle of Lidocaine Hydrochloride, and a letter written by pencil between her bench and the passenger."<sup>12</sup> The content of the letter asked for no panic, trauma or pain, on the day before, Neide had registered on a public notes' office the desire to be cremated.

After police investigations the case was filed as suicide, but feminists from all around the country and many people in town brought up the hypothesis of "file burning," since the mysterious death was not well explained by the competent authorities. About 3 years after the closing of the Family Planning Clinic, the jury trial that led to judgment the four employees that worked at Dr. Neide Mota Machado's clinic started on Campo Grande's Forum.

#### **4. Jury trial or witch-hunt?**

The Jury trial that submitted the four former workers from the Family Planning Clinic, Libertina de Jesus Centurion, Rosângela de Almeida, Maria Nelma de Souza and Simone Aparecida Cantagessi de Souza to the scrutiny of a popular jury had its first run on April 8, 2010, at 8 a.m., on the 2nd Section of the Jury Court on the Justice Forum of Campo Grande-MS county, lasting for 2 days.<sup>13</sup>

Despite the intense disclosure of the case on vehicles of mass communication, there were few people where the judgment took place. It was noticeable the attendance of friends and family of the defendants, students, law operators, and just five feminists from the city, among other actors made the timid and simple audience made by a group of a little more than 30 people. There were no banners, outcries or any kind of public manifestation on the front of the Forum, contrasting the intense acting of the Brazilian feminist organizations to stop the conviction of the clinic's patients, criminalized for abortion over the past 3 years.

Three members of the Prosecution Office, four defense lawyers, the judge, employees of the Forum and, posteriorly, the four indicted (who entered escorted by policemen), and the seven juries members of the Verdict Council composed the actors framework in plenary. It all seemed too serious and gloomy, except for the striking presence of the press. Journalists from various TV stations, from printed and online newspapers, made the event coverage with media ratio breaking the ice from the formalities and sobriety atmosphere.

The magistrate Aluizio Pereira dos Santos started the trial by communicating the criminal process instruction in plenary and identifying all the actors involved: the presiding judge (that is, himself), the prosecutors, defense lawyers and indicted.

After the initial instructions from the judge, the judgment started with the argumentation of Siufi, defense lawyer of Simone Cantagessi, who questioned the judge about to whom had been delivered the expert forensic medical report about

<sup>12</sup> Information available on the website: <https://alias.estadao.com.br/noticias/geral/livro-de-joseph-frank-e-mais-que-uma-biografia-de-dotoievski/70002482374> [Accessed on: August 15, 2018].

<sup>13</sup> The first date of the judgment was supposed to be on February 24, 2009, but it was changed by the judge due a question of order argued by the defense that pointed violation of natural principles and excess of accusations.



the medical records apprehended at the clinic. By highlighting that the results of the document's analysis does not prove the materiality of the crime, Siufi asks the judge the postponement of the Jury, an arguing that will insistently resume during the moments granted to the defense time.

*"If it was delivered to someone who's part of the Prosecution Office, I ask Your Honor for it to be officiated to the National Council of the Prosecution Office to take appropriate action, because I'm sure that if this document was here, the decision of the crime would be another" [29, 30].*

Siufi alerted that the report of indirect corpus delicti forensic exam already mentioned the material collected at the clinic, sustaining that the reports do not prove the materiality of the crime. This fact would show the existence of ungrounded questions and would allow blurred inductions of the case assessment. In face of that, the lawyer defended the postponement of the Popular Jury in view of the wide possibility of conducting the legal process through tortuous ways. Another two requirements are worded by the lawyer: the withdraw of the police escort around the defendants and the removal of two of the present prosecutors under the allegation of over charge.<sup>14</sup> Judge Aluizio Pereira dos Santos says:

*"Concerning the escort, the escort remains. The treatment that they will have will be the same as the others that were here, and we will ask the policemen to keep their distance because they're not dangerous, but in order to avoid some unpredictable situations the police will stay. Concerning the forensic reports, this is in protocol and we will see about that. Concerning the accusation questions, there are many, they exceed 512, but they are temporary, the wording is temporary, I will see the pleas and we will get to the end of the judgement to a wording that comes to attend the defense, the Prosecution Office and above all the judge's interests. [...] because we received a document from the court judge that I read carefully and it says that the jury can't be postponed. Concerning the presence of prosecutors in the plenary, they will stay as observers, the question is solved" (Aluizio Pereira dos Santos).*

Obedying the lawyer's request about the presence of the police in an oppressive position and repressing the defendant during the judgment, the judge kept the escort, but asking for a bigger distance between the police and the women. The speech of the magistrate seems to suggest an implicit consent shared by other actors in scene about the fact that the defendants are not "criminals," but had just committed acts adverse to the legislation and should answer for that. It also reveals a sense based on gender stereotypes, in which the feminine essence is not seen as dangerous or menacing by nature [31]. However, it does not redeem the situation.

The judge Aluizio dos Santos also informed the possible review of the accusation questions due to the volume of material and decided for the maintenance of the two original prosecutors in plenary only as observers,<sup>15</sup> being replaced by the prosecutor Douglas Oldergardo Cavalheiro dos Santos. Resuming session the judge explained the procedures for formation and acting of the juries council, highlighting the principle of incommunicability between the members of the jury and, then, handed

<sup>14</sup> Until this moment the responsible for the case were promoters Paulo Cesar Passos and Luciana do Amaral Nagib, being replaced when the judgment started by promoter Douglas Oldergardo Cavalheiro dos Santos.

<sup>15</sup> Lately those promoters left the room to avoid pretexts that could help canceling a future decision on the judgment.

over copies of a document containing guidance to the juries staff. Concluding this act, the judge requested the entry of the four indicted in the plenary.

A mix of apprehension, anxiety, emotional exhaustion and fear was painted on the face of the defendants followed by female police officers. On the chairs pointed by his honor, the corporal image of the defendants revealed certain submission and gentleness characteristic of feminine socialization. The curved silhouettes and the heads slightly bowed down indicated a clear attempt to hide or to look away, possibly scared, bewildered and embarrassed before the police escort ahead, the press' spotlight and the audience of little more than 30 people.

One of them was visibly shaken and tears ran down her face. It was then that the judge explained to the indicted she could wait on the adjoining room or even leave the court if she wanted, pointing out that the legislation did not define the mandatory presence of the defendants during the course of the judgment. On this specific matter, the judge considered that the Court presents a democratic characteristic.

The next stage consisted on the sortition of seven names among the 25 possible present juries. The defense refused two juries and the prosecutors three, requiring new draws until the final composition of the seven juries, composed by five women and two men. Then started the ritual procedure of commitment of the juries with the justice, wrought by the classic "So I promise."



On the next pages it will be described the most important moments of the trial starting with some considerations from the magistrate, followed by the testimony of the defendants, the prosecutor's speech and the defense pleas.

The synthesis of the accusation sentence read by the judge pointed the television coverage as the catalyst of the elements that provided the criminal investigation. His honor referenced the first material shown on TV, two reporters with a hidden camera disguised as a couple looking for an abortion at the clinic, subject to financial charging, and the second where Neide Mota admits openly in interview to the journalist Honório Jacometto to perform abortions by clients request. The defendants were indicted for involvement in 26 procedures of abortions in 25 women, totalizing 26 cases and 25 prosecution witnesses, at the Family Planning Clinic.<sup>16</sup>

The judge revealed that 51 witnesses were heard and that wiretaps were requested at the start of the process. He informed that he defended the temporary arrest of doctor Neide and Simone for 5 days but the Justice Court ordered their

<sup>16</sup> One of the defense witness had two abortion at the clinic, resulting in a total of 26 abortions that happened at the place.

arrest. The members of the jury understood that there was sufficient evidence as to criminal authorship and proof of materiality. Thereafter, this sentence was altered, but the prosecution appealed and the conviction was kept.

The questions period came next, when questions directed to the defendants referred to the time they knew Neide Mota, if they had knowledge about the abortion of living fetuses, if the judicial pardon was offered and another about the value of the appointments, the business hours, the procedures made at the clinic, if the doctor had patients designated by other doctors, if they identified the presence of patients that were on social columns, etc. The three nurses gave similar answers, saying they did not know Neide Mota before working at the clinic, and also their role on the clinic, like checking the blood pressure, weighing the patients and the medical screening. They also pointed they did not know about the removal of living fetuses alleging that the clinic only made the procedure of removal of retained abortions, cysts, curettage and DIU (Intra uterine device) placement.

They also stressed that women of low and high class attended the clinic, and many of them attended pointed by other doctors. One of them said it was usual the presence of notable personalities, influent and known people that were mentioned on social columns and that it had occurred the removal of a living fetus by court order, probably involving rape or fetal anomaly incompatible with life. Another one pointed that the clinic had operation license and went through frequent supervision of the Prefecture, also highlighting that the doctor always took part of Nursing Weeks in educational institutes where she gave lectures about contraceptive methods. Two of the three nurses conciliated the work at the clinic with services at other hospitals and the three denied peremptorily the accusation of criminal association. But they offered to collaborate on the process as to obtain judicial pardon. They highlighted they did not know the values charged and what happened during the appointment because Neide made the appointments alone with the patients in the room and that they, assistants, only obeyed the doctor's orders according to notes on the patients' medical records.

Simone Cantagessi was the only defendant that confirmed abortions at the clinic, but did not plea guilty on the criminal association charge. Unlike the information spread by the press, Cantagessi said she worked at the place for 6 months only, after moving from Goiânia to Campo Grande. She said she did not know the city, did not find regular work and that her function was to make the patients' medical screening.

At the appointment she questioned women about the reasons that made them look for an abortion, talked about contraceptive methods, explained the facts, the procedures and showed other options. She emphasized that the role of the psychology professional is not one of convincing and that interrupting the pregnancy was a decision that should be made by the pregnant women. She also revealed the impossibility of knowing if the patients went back because of the psychological treatment and that to her what really mattered "was their life, what they would chose for their life." She emphasized never have mentioned a price list<sup>17</sup> about the costs of having a child and even told the patients the story of a cousin who managed to sustain all her children working as a housekeeper. Her work consisted on simply clarifying the situation and talking about alternatives besides abortion.

<sup>17</sup> The price list containing information about the costs of raising a kid was found in one of the walls at the clinic and highlighted by press' ballyhoo. However, the information on this paper, taken from a magazine, did not work as a document that was related to the appointments with local workers and was a minor data on the case.



*"I know that in my country abortion is a crime. If regret could kill, I would be dead. I could have attended women at my clinic and would do it the same way. It bothered me the interview saying I worked five years at the clinic, but it was only 5 or 6 months when I arrived from Goiânia. Daniela was the former psychologist. All I hope is that justice will be done. But too many things were distorted. I regret what I did there. My council, the CRP (Regional Psychology Council) did not remove my license. I acted within my profession. I'm not the one who kills children, against life, like the press made me look" [29, 30].*

Following the jury, what was seen was an exaggeration of prosecution's powers that imposed inquisitorial emphasis upon the defendants, but that also exposed contradictions and a thirst for the conviction of the women, which will be shown forward on this text by the defense lawyer speech and reasoning. During some moments, the court resembled a big staging show, like a persuading game, rhetoric and eloquence on a fierce duel between promoter and the defense.

At the start of the accusation charges, Douglas Oldegardo Cavaleiro dos Santos exhibited the TV report where Neide Mota confirmed to performing abortions. The prosecutor signaled that the journalistic material showed facts that should be of everyone's knowledge due the placement on television, warned the jury to be careful on not making judgments based on previous opinions. It was also said that the case of the Family Planning Clinic had, possibly, the biggest amount of procedural documents on the history of the Mato Grosso do Sul Court. One of the biggest concerns of the prosecutor revealed on the court was "the inductive detour of this polemic's process," because it was not about being pro or against abortion. The discussion should be linked to the law, despite the pressure of NGOs that, according to the prosecution, would report to international instances the case on Mato Grosso do Sul. It was explained that the case of the Family Planning Clinic was one of violation of the right to live because there is no place in the world, not even where abortion is legal, that it is made on the first time a woman arrives to a clinic.

The prosecution alleged that abortion has nefarious effects on the psychological integrity of the women and highlighted the financial interests, the mercantilist character and the social segregation of abortion on Dr. Neide's clinic. They also said that the clinic had expired medications, veterinary medications used for "pig abortions"<sup>18</sup> and a "disgusting fetus absorbing machine." At this moment, the promoter requested that the materials collected at the clinic were brought and took from a transparent plastic box the "disgusting absorbing machine," showing it to the plenary. Concerning the medical records and apprehensions, the prosecutor said that they did not prove the materiality, but corroborated with the materiality. Concluding, he said that there were the pro-life and pro-choice groups, but no feminist movement would be favorable to what happened at Doctor's Neide Mota Machado clinic.

The prosecution then made explicit the accusation made by the 25 witnesses, that is, the women that confessed having an abortion. Each one of the four defendants there at the jury's mercy was accused for involvement on intervention of 26 aborts for working at the clinic, however, not having participated on the same way on each one of the 26 procedures, because the effective support varied according to professional competence and their work hours. For instance, in some cases, there was no even contact between the employee and the patient. That means that the charging

<sup>18</sup> Promoter refers to the medication Cytotec. In some moments of his exposition, it could be seen the use of the word "kids" instead of "fetuses".



points by which they were being accused were not similar for all the defendants, because they were elaborated according to the participation on the facts. The prosecution persisted with the presentation emphasizing the importance of individualization of each case being judged, that is, in line with the specificity of the involvement of the defendants and meticulous analysis of the charging points on account of the high numerical proportion.

Following, they listed the accusations: abortion assistance, patient's persuasion, patient's medication with abortive drugs, among others. However, it was recognized that they did not have proof enough for five of the confessed abortion cases and that other six witnesses had not spoken about the involvement of the health professionals. It was then pointed 15 accusations made by witnesses and the judge received the request of conviction of the three nurses. One professional should be condemned for one case and participation on two abortions; the other assistant should be condemned on five cases of abortion and the third defendant for collaborating on four abortions. For the nurse was requested the condemnation on four occurrences and involvement on other five with minor participation; for the psychologist, the prosecution requested condemnation for acting on five episodes and minor participation on another four. The prosecution finished pointing out that the defendants had good nature, but would still pay for the mistakes made at the clinic, remembering that 12 out of the 13 women that alleged to having aborted declared regret. Furthermore, it was insisted that the treatment at the clinic was a system that privileged the abortion in detriment of protection of the patients or of another option on the pregnancy.

Only two defense lawyers requested speaking time. The first emphasized that the defendants cooperated with the investigation, but without the grants of judicial pardon like many patients attended at the clinic. He reiterated once again that the reports about the medical records does not prove the materiality of the crime and, therefore, there should be no prove, only mere assumptions. He argued that the 1988 Federal Constitution, Brazil's supreme law, requires the materiality for conviction. Lawyer Siufi initiated his speech showing one of the tv news that originated the charge: the news report recorded with a hidden camera on which his client is shown guiding a supposedly pregnant couple looking for abortion. He highlighted the illegal character of the recording from TV Morena, affiliate of Rede Globo, mocking: "a TV channel that preaches morality, see the example set by Big Brother" and accentuating society's hypocrisy.

Siufi's exposition was marked by questionings about the methods used for producing evidence, contradictions, arbitrariness and the lack of sustainability of the condemnations. Adding to the reading of the prosecutor about the accusation of abortion practice involving Simone Cantagessi, he alleged that the incrimination had no grounds, since there was no determining participation of the healthcare professional in many of the cases pointed out by the prosecution. Going through the testimonies of some accusation witnesses read by the prosecution, the lawyer detailed that there was no participation from the psychologist. In three cases Simone just had a talk with the patient. In one of them the accusation witness alleged to having a spontaneous abortion at home and did not look for the clinic again, on the other two, accusation related the fact that the psychologist did not induce or persuaded them about abortion. Siufi explained that it was within the competence of the psychologist to talk with the patient, being that the professional did not talk or, much less, decided and encouraged the interruption of pregnancy. "That was her job," asserted the defense. In other nine cases there was no participation of the psychologist, since the witnesses did not even mention her name or guaranteed they did not talk to her.

The defense also recalled that judicial pardon was considered due to Simone's collaboration on investigations and the prosecution recognized her collaboration, signaling at judicial pardon, but during final allegations looked down on Simone's help and did not grant the pardon.

Unlike his client, Siufi highlighted that some patients at the clinic had a different procedural treatment and received judicial pardon. The defense then questioned who were those women, sharpening public's curiosity: The question that remains is who are they? Were they rich? Congressmen's lovers? Authorities' daughters? High class people? According to the defense, this discrepancy on treatment aroused suspicions about the suitability of the judicial procedures, because the judge's decision left behind doubts for benefiting people who also had participation on the events.

Another point discussed was the early access by the Prosecutors Office to the expert report of medical records. The lawyer emphasized that prosecution already had privileged information long before the other parts, even the defense. Lawyer Siufi also warned to the time required to evaluate in detail each point to be judged. Due to the high number of questions under examination, the defense speech said that if the review of each question point took 5 minutes, it would be necessary more than 2 days to finish the trial.

The defense also insisted pithily on reflecting about the motivations who took a big quota of women to opt for interrupting the pregnancy, like the lack of financial condition, pressure of a partner who does not want the child or the male abandonment before the pregnancy, as well as emotional conditions, the delicate dilemmas and the most intimate feeling of each woman before a unwanted or unplanned pregnancy.

*"Did the person have no way of raising a child or the father did not want to recognize it? Were they forced by their boyfriend, husband or fiancées? How many people we know that were forced to give up their child for adoption because they had no conditions of raising it? Am I saying any lies here? Those kids at the streets in Campo Grande, it's not about being pro or against abortion, no! It's necessary to see the inward of everyone. How can I get into the heart of someone who's sweet, that no one knows? How can I? Campo Grande has around 800 thousand people. Those 10 thousand women, they are about 5% of the population over those 20 and some years. That was on Dr. Neide's office, it was a medical document, it was in her office" [29, 30].*

One of the peaks of the judgment was Siufi's revelation about the lack of proof on the presumed abortions that happened at the clinic, according to the information subsidized by the expert report regarding the content of the medical reports. He stressed that the proof of crime is given by the materiality of the crime, that is, the report of the corpus delicti examination. Therefore, it is not about speculating or judging if the woman committed or not the abortion. And the material proofs, the report of the indirect corpus delicti examination did not prove the abortions.

*"There was no participation of Simone on Aline's case or in any other. There's no way to know, the reports don't prove. There's no way to know if it was DIU placement, spontaneous abortion, cyst or curettage. There's no way to know. And even in doubt there is a conviction against Dr. Simone. If she had no part, she did not participate in anything. Your excellencies will have to absolve her. Without the first accusation point all the others are harmed. And also the judicial pardon and the penalty reduction, there's no need of all that and the other accusation points. Tatiana also had no participation, nothing, from Dr. Simone. I'd like you to judge this case correctly" [29, 30].*

As it was, there would be no proof of Simone's participation in any case since there was no material proof, Siufi concluded saying that "to judge you peer is not something easy" and asked the jury to vote "no" on all the first accusation question and, in that way, absolve the defendants.

*"They even say that this is the only power that men took from God's hand, because there's the power to convict and the power to absolve. I know that the late hour is tiring, but I want to say to Your Excellencies, I'll ask Your Excellencies to say no to that [...] if Your Excellencies understand the condemnation and have any doubt in your mind, when it's time to cast the vote, say no to the first question [...] Say no to this here, which is the portrait of hypocrisy, because it cannot be the fight between the rock and the sea and make the seashell suffer the consequences. No. But I wish that Your Excellencies say no to all the first questions: No. And after Your Excellencies leave this Court, after all the work and love given to the justice's cause, I wish the regret of having convicted four innocents do not keep you company" [29, 30].*

The judge notifies that he finished the discussions and grants the prosecutor the right to a replica, but he does not use the contestation. After that he relates to the jury that he will explain about the accusation questions on the secret room and how the procedures will take place, when he will also answer questions about "the matter of facts." The meeting was finished with "more than 600 questions," highlighted the judge, concluding to the jury: "about the questions we'll explain what the prosecutor and the defense thinks."

The trial decision happens on the next day. On April 9, 2010, 2:50 pm, the magistrate publicly advertised the decision of the jury to convict the defendants. The result of the sentence presented a negative balance for the clinic's workers: Maria Nelma was convicted to 4 years on semi-open regime; Libertina to 1 year and 3 months on semi-open regime; Rosângela de Almeida to 7 years on semi-open regime; Simone was condemned to 6 years and 4 months on the semi-open.

To finish, the judge thanks the jury, the lawyers, the prosecution and concludes the judgment. But something unusual happens, because there would still be a manifestation against the decision of the Jury closing with golden keys the scenario of "the case of the ten thousand" as a miraculous movie story. Undismayed by the final sentence, Simone Cantagessi's husband (who is also a judge) makes a touching plea and public protest, but without obtaining a favorable result, since the case had already been judged and decreed finished by the judge. On October 8, 2010, the employees from the former doctor Neide Mota Machado's clinic had their penalty reduced by the Justice Court of MatoGrosso do Sul: Maria Nelma had her penalty reduced to 2 years, Libertina was limited to 10 months, Rosângela's was reduced to 1 year and Cantagessi two.

## **5. Final notes: the deleterious effects of criminal law and the right to health**

Themes like abortion, maternity and law devices on the reproductive scope cannot be dissociated from gender conventions immersed on the historical context of each period and society. The Brazilian Criminal Code from 1940, on its article 128, which proscribes abortion, was promulgated on Getúlio Vargas' government, in full dictatorship, and with inflexible gender traditions: few women worked outside home, had a college degree, could choose about having or not having children or even voted.



In 1945, the country resumed the redemocratization process and decades later, in 1964, suffered a new coup d'état orchestrated by the military, that overlapped the Democratic State and initiated a period of strong censorship, political persecution, torture and death. Even in this context, feminists denounced the oppressions of a patriarchal society, raised the flags of "personal is political," preached the end to domestic violence, of defense of sexual freedom, of the non-demonization of contraceptive methods, of the right to control their own body and reproductive self-determination.

Since then Brazilian women obtained a series of achievements, like more space and participation in society, public politics and specific laws to prevent and reduce violence against women and changes on the conservative mentality on the field of gender relations in the sense of more equality. Many of these achievements were driven by International Conferences related to women rights promoted by United Nations on the decade of 1990 in conjunction with feminist activism.

Stands out the International Conference on Human Rights, held in Vienna in 1993 [20]; that states in its article 18 that rights of women and girls are inalienable; the International Conference on Population and Development, in Cairo in 1994, asks the States for investment on familiar planning politics, the reduction of maternal mortality and the review of punitive laws that concern abortion; and the IV World Conference on Women, at the city of Beijing in China in 1995, that requested to the government the use of gender perspective on the development of policies for women [21].

However, the inequalities between men and women are still significant in Brazil. Abortion is not allowed by law yet, the participation of women on parliaments is minimal, the rates of domestic violence, of femicide and maternal mortality are very high and, broadly, they still have the lower wages in the market for the same work developed when comparing to men.

In the last decades, the reversal has been enormous. On the field of reproductive self-determination it can be highlighted the dozens of legislative proposals that seek to restrict women's reproductive rights on process in the National Congress, like the Legislative Proposal 478/2007—called Statute of the Unborn (Estatuto do Nascituro), which prohibits abortion in all cases, even rape, and turns the insecure abortion into a heinous crime; the Legislative Proposal 3748/2008, which provides child support to the mother for giving birth to children conceived through a rape crime; the Legislative Proposal 1413/2007, which prohibits the distribution of emergency contraceptive (known as morning-after pill by SUS—the Health Unic System (Sistema Único de Saúde)) and its commercialization in drugstores, among others.

The laws, roughly written by men, do not escape gender representations inserted in long term history. Fausto [17], on the literary work "Crime and Routine," a study about criminality in São Paulo city between 1880 and 1924 considers that the efficiency of the criminal action is not only technical, but is related to social discrimination working as a repressive practice that can even criminalize behaviors apparently nonchalant to criminal law, like the imprisonment of prostitutes, homosexuals and women who opted for abortion.

Therefore, the inappropriate behavior according to sex within the family and society, as well as ethnic-racial characteristics influence the conception and definition of the offense and on the application of punishment on the transgression scope. Furthermore, Fausto [17] signaled the existence of criminal behavior that did not draw police's attention, like assaults practiced by husbands and certain sexual crimes.

This question highlights the police convenience with social mentality in the process of naturalization of violence against women, including there the denial to



women of their faculty of reproductive choice, on the domestic and family scope throughout history. It became evident on the case of the women criminalized for abortion in Campo Grande, when police, a prosecutor from the Prosecution Office and a judge from the Jury Court made a task-force for the massive indictment of ten thousand women who went to the Familiar Planning Clinic from Neite Mota over the 20 years it operated.

The ten thousand women from Campo Grande and a million more that perform abortions every year on the Brazilian society reveal that the prohibitive criminal law is innocuous and detrimental in case of the voluntary intervention of pregnancy. Either because it does not prevent thousands of women to perform an insecure abortion, at large, precariously and onerously, opting for illegal clinics, midwives, with the help of people without proper qualification or even in a solitary way, using medicines from the clandestine market, the consumption of teas or introducing objects in the genital tract intending to pierce the uterus, often without any professional guidance, sterilization processes, emotional support or the minimal hygiene and safety conditions. Either because it does not respect the dignity and autonomy of women as ethical beings capable of mature and conscious choices about their lives.

It is known that the condition of illegality makes it difficult to quantify accurately the number of abortions practiced in Brazil. According to research developed by the National Feminist Network for Health and Reproductive Rights, in 1991, based on a methodology developed by the Alan Guttmacher Institute, which calculates the data by the use of surveys of hospitalizations for abortion in the health services, pointed out the occurrence of 700,000–1.4 million abortions in the country. More recent studies identify that this estimate remains the same.<sup>19</sup>

If in one hand, the advent of the birth control pills on the decade of 1960 contributed to the exercise of a sexuality unlinked to reproduction, on the other, the existence of contraceptive methods with low hormonal dosage or compatible with organisms of different women are not always available by the public politics on Mato Grosso do Sul and the whole country.

According to the “Dossier on insecure abortion for advocacy: the impact of abortion illegality on women’s health and quality of reproductive health care in Campo Grande and Corumbá, Mato Grosso do Sul,” published in 2010, there are deficiencies in the Family Planning Programs, the distribution of medicines and the quality of care provided to women in the local public health system, which make it difficult for women to acquire contraceptives, as well as seeking and adhering to routine medical treatments and appointments. The failures are mainly “related to the quality of medical care, maintenance of the stock of medicines and consequently the continuity of the supply of contraceptive methods” ([32, 33], p. 4). One of the health managers interviewed by the research team of this Dossier, who was then responsible for following the Family Planning Program of the capital, openly exposes the problem:

*“...we don’t have the monthly injectable contraceptive in the system, there’s no implant, levonogestrel IUD, vaginal ring and contraceptive patch. The SUS (Health Unic System) still cannot get even close of a bold and modern familiar planning. We also don’t have the proper “provision” of the IUD short stock (for women with hysterometry smaller than 7 cm); and of the quarterly injectable. Frequently there’s no appropriate provision of the stock; many women discontinue the use because of the lack of the quarternal.”*

<sup>19</sup> On that, consult the 2016 National Research on Abortion (PNA 2016). Available from: <http://www.scielo.br/pdf/csc/v22n2/1413-8123-csc-22-02-0653.pdf> [Accessed on: December 18, 2012].

Add to this the difficulties that many women feel when negotiating the condom use with their partners and the fact that any contraceptive can fail. That is, women and men do not have the same power, risks and benefits on the sexuality and reproduction scope. It is upon the feminine body that falls the damage caused by the continuous use of birth control pills and there is no fair distribution of the risks if we consider the organisms of men and women.

Furthermore, the differences on the social conditions of the feminine population affects the greater or lesser access to quality of life, information, medicines and health care. And they are the ones who get pregnant and are given most of the responsibility for care and education of children—in most cases, without the help of the father. It is also little emphasized the male responsibility on the administration of fertility and contraceptive medicines that are efficient for men lack in the research field [2].

*On the other side, it is important to rethink that the fact that the gestation develops inside the feminine body has particular relevance. If the right to privacy involves the power to exclude heteronomous interventions on the owner's body, it is hard to conceive an intrusion so intense and severe upon someone's body, like the imposition on pregnant women to keep a pregnancy, for 9 months, against their will [5, 6].*

Although the male participation on an undesired pregnancy is an elementary evidence, the onus of an illegal abortion falls upon the feminine population's organism, including the risk of damage to health and of death, as well as criminalization by justice, weakening the right to health disposed on the Article 6° of the Brazilian Federal Constitution and the recommendations of international agreements from the United Nations signed by the country.

According to the document formulated by the UN Special Rapporteur for the Right to Health in 2011 [34], named "The right of every person to experience the highest level of physical and mental health," the prohibitive criminal laws about abortion contradict the human dignity, a fundamental principle of Human Rights, because it affects the mental and emotional health of women and interfere on the freedom to make decisions without the state's intervention.

Still according to the document, when criminal law is used to regulate and restrain sexual and reproductive conducts, the State imposes itself forcefully submitting and canceling the desire, conscience, autonomy and the life project of the individual. Like this, the penalization of abortion represents a violation of the right to sexual and reproductive health and a severe interference of the state on women's life. "The criminal laws that punish and restrict the induced abortion are the paradigmatic example of the unacceptable barriers that prevent women from exercising their right to health and, consequently, should be eliminated" ([35], p. 9).

It is relevant to remember that the case of the ten thousand was structured based on the medical reports seized at the Clinic. However, the police order did not authorize the seizure of the medical records, which violated the right to medical confidentiality of the patients, their intimacy and privacy. On this subject please note that the Federal Constitution of 1988, on its article 5°, subsection X, underlines: "Inviolable are the intimacy, the private life, the honour and image of people, and is guaranteed the right to indemnity for material or moral damage derived from its violation" ([36], art. 5°, subsection X).

Additionally, the expertise examination on the seized medical records did not prove the abortion practice, even so around 1500 women were sued by justice and four employees condemned by the institution of the Jury. The judge, prosecutors and the police detective declared at various times to the press the fact that abortion

is a crime in Brazil, therefore, they should obey the law. However, this plea was not utilized in respect to the lack of materiality of the crime, which makes the trial before a popular Jury, in a country where the population is mostly catholic, strategic to condemnation.

After all, the role of the judge in the Jury Court is to basically police and preside over the tasks, falling upon the juries the verdict without the need of legal justification on the decision [37]. Another aggravating factor to the situation is the fact that we live in a culture strongly influenced by religious dogmas that are contrary to abortion. Moreover, the disclosure of the case by mass communication vehicles informed and misinformed, cultivated judgments and helped to shape a sentence in the consciousness of each citizen, aspect that needs attention for the fact that the judgment was submitted to decision of a popular jury [37].

The ballyhoo of the press around the abortion commerce on the Familiar Planning Clinic highlighted the financial gain over the women's suffering evoking the idea of social selectivity. The commodification of abortion is a point that tends to weigh on the balance in many cases of clinics taken to the judiciary, notes Oliveira (2010). It was one of the pleas used by the prosecution during the Jury trial, as if the charge of financial honorariums was something even more inhuman in the context of a voluntary interruption of pregnancy.

The health market was not invented by doctor Neide's clinic. Just see how much it costs the obstetric follow-up during the 9 months of pregnancy, the price of medical exams, the value of child-birth charged by private doctors, the room rate in the maternity ward and the corporative interests linked to the powerful medicine market. In our society, the solution for pain, the treatment and cure of patients becomes, many times, a merchandise as any other inscribed in the trade and consumption circuit.

A little addressed challenge by the local press was the perception of sexual and reproductive rights comprehensively. For Corrêa and Petchesky [2], it is necessary to consider the relation between power and resources available to women concerning the decision-making on the sexual and reproductive scope. These authors highlight the necessity to understand these rights beyond the "particular freedoms" or "individual choices," but related to social, cultural, economic, gender, class, race, ethnicity conditions and the public policy devices available for each woman particularly and jointly and, like this, seek to understand the specifications of the decision for abortion.

The right to health needs to be understood interconnected to the other rights considering the body of the individual, its subjectivity, relation, material and economic conditions and the whole existence of its life in society, including there, the structural transnational violence and the world around them. According to the World Health Organization (WHO), health does not mean absence of diseases, but envelops comprehensive bio-psycho-social aspects that affect the quality of life and well-being of people.

Therefore, the abortive itineraries cannot be treated for the criminal aspect, as determined by many international conferences, pacts and conventions on the field of human rights of which Brazil is a signatory, among them the documents deliberated on the International Conference on Population and Development (ICPD) and in the IV World Conference on Women, that reiterates the commitments of the ICPD and highlights that abortion is a public health problem and not a crime [21].

In this context, to judge an equal in the face of such dramatics, intimacies and human vicissitudes that mark the existence of thousands of women in all country is an act of disrespect of human rights, aggravated by the time limitation for reflection of the high numerical proportion of question appreciated by the juries in the case of



Campo Grande. It is not enough to emphasize the legal particularities of the process and the importance of individualization of cases for each of the employees on the defendants' bench, as indicated by the prosecutor during the trial. It is difficult to understand the reasons that took many women to interrupt a pregnancy, the intense physical and emotional suffering lived with the maintenance of a forced pregnancy, the paths, sensitivities, consciousness and reasons that lead four salaried workers to service at the Familiar Planning Clinic.

*Each citizen is a stand-alone agent capable of making decisions based on personal values, ideologies, beliefs and reasons, specific life situations and plans for the future, using freedom as guide. However, to the extent that women and men are differently affected by the impact of reproduction on the organism, to force women into unwanted pregnancy violates integrity, hurts the dignity and reduces their bodies to mere reproduction instruments. This creates the necessity of legal guarantees that protect the individuality and decision of women. The restrictive criminal law, however, is a punishment for women. On the "case of the ten thousand," for instance, only five men were indicted [24].*

That way, what was observed on the case of the ten thousand was a mass criminalization of the feminine gender, once only a few men were sued by justice. This shows the gender inequality on the field of right to health and on the juridical treatment on the abortion matter, damaging the fundamental right to freedom, equality and the guarantee of the principle of reproductive self-determination to the female population [24].

The secularism of the State, the freedom of conscience and beliefs are premises defended by the Federal Constitution of 1988 that, in its article 5º, subject VI, disposes: "It is inviolable the freedom of conscience and beliefs, being assured the free exercise of religious cults and guaranteed, in the form of the law, protection of places of cult and its liturgies." And Article 19, subsection I, of the mentioned Constitution, prohibits the Union, the States, the Federal District and the Cities to "establish religious cults or churches, subsidize them, impair their operation or keep with them or their representatives dependency relationships or alliance, excepted, in the form of the law, the collaboration of public interest." The Brazilian State is secular, thus, the country cannot legislate nor build universal public policies guided by moral or religious beliefs.

In regard to the principle of equality, as established by the Article 5º, subsection I, of the Magna Carta, the prohibition of abortion leads to a context of gender discrimination, because it imposes greater onus on women than men, as well as among women themselves depending on their social conditions, since the consequences of clandestine abortion reach more drastically women in situations of economic vulnerability.

Still on this premise, we must remember that the condemnation for the women from the Familiar Planning Clinic was uneven. The richer could convert their sentence to a fine, but the poorest, considering black women together, in general, had to provide community services at schools and daycare centers where they lived with children and a likely feeling of guilt and emotional suffering.

One may conceive that the poor majority left their homes at dawn to provide the community service and, lately, went to work, usually poorly paid domestic work, and at night they still took care of their own home and family, a strenuous journey. Punished by their social condition, deficient services of juridical defense and precarious services of familiar planning, women from the popular layers and employees from Dr. Neide Mota's clinic, were the most penalized. This is an example of how the gender, ethnicity, race and class categories pass through the



institutional, medical and legal structures. The social construction of the feminine is, like that, indispensable to think about the differential treatment that women had if compared to men in the case of the Familiar Planning Clinic. As explained by Corrêa:

*Because the social construction of the feminine and of the feminine bodies is strongly associated to the signs of guardianship, they are constructions that conceive the feminine as “out of order,” like bodies and subjects that has no capacity of taking care of themselves. They are bodies destined to give birth to children for the State, the capital, the job market, the family and, because of that, women should be protected. The poorer and financially dependent the person, heavier are the protection and vigilantism rules on them.*

During the Jury Court, the defense of life was a plea used by the prosecution to condemn the women. However, defense of life is not compatible with the option for abortion. Within the sciences the concept of life has many meanings. In biology, to exemplify, a line of research identifies life in the origin of cells. Other biologists seek to investigate the essence of what determines the entity of the being or even speculate whether life resides in the transmission of hereditary traits through genes. There are still those who consider life a relational process between organisms and the environment. “The organism subjectively interprets the world and itself and, in so doing, constructs its environment” ([38], p. 21).

In this relational perspective the notion of life and its sacredness is perceived as communication. Thus, biological science must invest in researches that are capable of capturing the signs relations more than, purely, the relations between molecules. That is, “life is not something possessed or donated to a given entity” (Coutinho et al. 2008, p. 22) or just something of a material substance. It is, above all, a continuous process of semiotic relations between organisms and the environment. “In reality, the name ‘life’ is merely the reification of the process of being alive. It does not exist as an independent reality” ([38], p. 2).

Thus the theoretical, philosophical, or metaphysical speculative search for the concept of life, more emphatically about which moment can be considered as living, does not seem to be so relevant to biology in the face of the pressing need for empirical research. The author of this text also believes that it is not primordial to sociology to lean on studies to identify the exact moment in which one begins the life before the necessity of the empirical investigation, that, in the case of the abortion, must analyze and understand each concrete and particular case of the experiences of the women involved and their relationships with the environment.

*“If we can understand the controversy about abortion as a discussion linked to other differences of religious and philosophical opinions, we’ll understand better in what and why we diverge. We will also be in better condition of emphasizing the points in which we agree and of noticing in which way our divisions, however profound and painful they may be, are still rooted to a fundamental unity of humanitarian conviction. What we share is more fundamental than our divergences about your better interpretation” [39].*

Therefore, in many countries where abortion is legalized, that is, more than half of the world, the constitutions protect the life of the fetus and allow the voluntary interruption of pregnancy [5, 6]. And in those countries, it is not too much to highlight, the abortion and mortality by abortion rates go down if compared to the period of zero tolerance of the punitive prohibitionism.

In many of these legislations that allow abortion and ponder about the life of the fetus and the pregnant woman, the resource to abortion is foreseen in cases of risk to physical and emotional women health. And also due to economic, social and varied familiar issues, sexual violence and fetus with incurable anomaly, besides the recommendation of dialogs with the pregnant woman in search for alternatives before abortion, teaching us the necessity to ponder with respect, wisdom and sensibility how to equate the reasonableness of rights between the life of the fetus and of the women without maculating our most precious good: the human life [40–45].

Like this, the life of women, complete human beings, that have histories, families, friends, feelings, desires, pains, joys, projects, frustrations and dream, it is preponderant, in many laws of the nations that allow abortions, in relation to the intrauterine life. In life inside the uterus there is no person or complete subject capable of enjoying the fundamental rights. That is, the embryonic cells are not an integral person yet, a human being that suffers, lives, toil, has problems, yearnings, realizations and difficulties. There are also various other laws in which there is no primacy between the right of women and the life of the unborn, but an equivalence between the two, that in the impossibility of harmony it is necessary to admit the prevalence of only one right based on the context and on the delicate relation established between the pregnant woman and the fetus [5, 6].

It is necessary to consider the stories and life experiences, the paths, the present conditions and projects for the future, the power imbalances in relationships between women and men, the assorted economic, physical and emotional conditions, the masculine subtle coercion modes to engage sexual relations without the use of preservatives, among a series of situations, reason and the most intimate and inviolable feelings that provokes certain behaviors and the choice for abortion, to think about such a delicate and controversial theme. The scarcity of familiar planning services, the high number of insecure abortions in the Brazilian society and the public health problem generated by the punitive prohibitionism of the law, are necessary contexts, moreover, for the reflection about the need to revise or dispose of such legislation.

Women health cannot be put at risk by an antiquated legislation, a religious morality, misogynist conventionalisms, biopolitics interests in the population control or by the coercive power of the State on the restriction of freedom and interference in the individual privacy. The tutelage over their bodies and consciousness, be it by men, the church, the judiciary, the medics, on the intimate and essential decision-making for their bio-psycho-social well-being, life quality and project for the future, prevents women for being acknowledged as subjects, whole people with ethical capacity and autonomy of making choices by themselves that are better or less harmful to them and their environment. Democracy and the exercise of full citizenship will only be possible with a law that guarantees human, sexual and reproductive rights of women in detriment to the preconceptions embedded in society. It is time to change a situation that stigmatize, penalize, mistreats and reap life of thousands of women every year in Mato Grosso do Sul and all over Brazil.

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